Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

181

No. 10-1011

In The
Supreme Court of the United States

WINNEMUCCA COLONY COUNCIL,

Petitioner,

v.

SHARON WASSON and the
WINNEMUCCA INDIAN COLONY COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MITCHELL C. WRIGHT, ESQ.
Nevada State Bar No. 5835
LAW OFFICES OF
MITCHELL C. WRIGHT
325 West Liberty Street
Reno, NV 89501-2011
Telephone: (775) 324-1117
Facsimile: (775) 324-1118
mitchwright@wrightlawoffices.com
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the United States Federal District Court exceeded its powers by interjecting itself into the fray of competing tribal factions within a single tribal government to determine which faction shall have control over tribal treasury resources thereby imputing governmental control of the tribe to that faction in contradiction to policies of self-determination and self-governance under 25 U.S.C. § 450n and other individual sections of the Indian Self Determination Act.

2. Whether under 25 U.S.C. § 450b(l) the United States Court of Appeals for the Ninth Circuit erred in upholding the District Court's Order awarding tribal funds to a faction unrecognized by the BIA but purporting to be the legitimate governing body of the tribe even though the faction was not democratically elected by eligible voters of the Indian community.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

HISTORY OF PROCEEDINGS 4

REASONS FOR GRANTING THE PETITION 14

I. A PRINCIPAL MUST BE PUT IN PLACE BY THIS COURT FOR THE RESOLUTION OF CASES OF THIS TYPE. WITHOUT A CONSISTENT PRECEDENT ACROSS THE COUNTRY, THESE TYPES OF CASES CONTINUE TO GROW. A CLEAR AND CONCISE PRINCIPAL MUST BE ANNUNCIATED BY THIS COURT TO ELIMINATE FUTURE DISPUTES FLOUNDERING WITHOUT DIRECTION 14

II. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS MUST BE OVERTURNED AND THE PARTIES RETURNED TO THE POSITION THEY WERE IN PRIOR TO THE RULING SO THAT A PROPER AND FAIR ENROLLMENT AND VALID ELECTION MAY BE HELD 16

CONCLUSION 17

TABLE OF CONTENTS – Continued

Page

APPENDIX

United States Court of Appeals for the Ninth Circuit Memorandum filed October 14, 2010 .....App. 1-7

Order Vacating Decision and Remanding of the United States Department of Interior dated December 17, 2010 .....App. 8-24

United States District Court of Nevada Order dated April 29, 2008 .....App. 25-29

United States District Court of Nevada Order dated March 6, 2008 .....App. 30-43

Per Curiam Order of the Inter-Tribal Court of Appeals of Nevada filed May 17, 2007 .....App. 44-46

Decision and Order of the Inter-Tribal Court of Appeals of Nevada filed September 16, 2004 .....App. 47-60

Decision and Order of the Inter-Tribal Court of Appeals of Nevada filed March 19, 2004 .....App. 61-71

Minnesota Panel Decision filed August 16, 2002 .....App. 72-98

Decision of *Pro Tem* Judge Steven Haberfeld, Winnemucca Tribal Court, dated May 9, 2002 .....App. 99-158

Order for Permanent Injunctive Relief and Restraining Order, Winnemucca Tribal Court, Judge Kyle Swanson, filed January 18, 2001 .....App. 159-171

TABLE OF CONTENTS – Continued

Page

United States Court of Appeals for the Ninth Circuit Ruling Denying Motion for Reconsideration filed November 9, 2010 .....App. 172-173

Agreement on Appellate Panel dated July 12, 2002 .....App. 174-179

Stipulation to Reinstate the Council of the Winnemucca Indian Colony, USDC NV Case No. CV-N-04-0573, dated December 20, 2004 .....App. 180-184

Letters from Treva Hearne dated October 15, 13 and November 9, 2010 .....App. 185-188

TABLE OF AUTHORITIES

Page

CASES

Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) 16

Nero v. Cherokee Nations, 892 F.2d 1457 (10th Cir. 1989) 14

STATUTES

25 United States Code
§ 450b(l) 1, 16
§ 450(n) 1
§§ 1301-1341 14

28 United States Code
§ 1254(1) 1

OTHER AUTHORITY

Winnemucca Law and Order Code Title 1 Section 1-90-010(c) 6

OPINION BELOW

The Ninth Circuit Court of Appeals did not publish an opinion in this case because it determined that it was not appropriate for publication. Its Memorandum is reprinted in the Appendix at 1-7.

JURISDICTION

The Ninth Circuit filed its decision on October 14, 2010, and entered an order denying Petitioner's Petition for Rehearing on November 9, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

25 U.S.C. § 450n

Nothing in this subchapter shall be construed as –

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

25 U.S.C. § 450b(l)

For purposes of this subchapter, the term –

(l) "tribal organization" means the recognized governing body of any Indian tribe; any legally established

organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

STATEMENT OF THE CASE

This case involves questions of great importance to disputing factions of Indians across the United States. Disagreements between Council Members of the Winnemucca Indian Colony ("WIC") resulted in the tribal government splitting into two disputing factions. These factions are known as the Wasson Group and the Winnemucca Colony Council ("WCC"). Protracted litigation commenced beginning in the Winnemucca Tribal Court where the disputes evolved to the Inter Tribal Court of Appeals in Nevada, the CFR Court, the Bureau of Indian Affairs ("BIA"), the Interior Board of Indian Affairs ("IBIA"), and the United States District Court. Bank of America brought the underlying interpleader action in the United States District Court of Nevada ("USDC") for a determination as to which of the two disputing factions had authority to use the account opened in the name of WIC. Appendix (hereafter "App.") 31. Tribal Members of WIC will be irreparably harmed if

the Memorandum Decision of the Ninth Circuit Court of Appeals ("9th Cir. Ct.") (App. 1-7) is allowed to stand. The 9th Cir. Ct. affirmed the Order of the USDC granting a Motion for Summary Judgment in favor of Defendants, the Wasson Group (App. 30-43; App. 25-29) ruling that the decision by the Minnesota Panel (App. 72-98) was a binding, non-appealable order in full force and effect, and ordering the disbursement of tribal funds held in interpleader to "the council recognized by the Minnesota Panel's August 16, 2002 order" [the Wasson Group] (App. 43). This resulted in recognition of one of the disputing factions (the Wasson Group) as the legitimate Council Members of WIC and "awarding" control of the interpled funds belonging to WIC to a non-existent council. The Minnesota Panel August 16, 2002, decision is stale. Only two (2) of the original five (5) individuals named as Council Members in that Order are still alive or members of the Tribe. Although it can be asserted that the ruling merely decided who gets the money, what has been inferred by this ruling is that the persons named therein constitute the legitimate tribal counsel for the Winnemucca Indian Colony. *See*, App. 185-188 and App. 8-24.[1]

---

[1] As can be seen from these documents, the Wasson Group, by and through its attorney, Treva Hearne, has initiated trespass actions against WCC through the IBIA, and has threatened WCC with criminal and civil actions as a result of the 9th Cir. Ct. decision.

HISTORY OF PROCEEDINGS.

The evolution of the Winnemucca Indian Colony ("WIC") and the underlying facts of this case are best set forth in the Decision and Order of Steven Haberfeld, *pro tem* Tribal Court Judge for the Winnemucca Indian Colony in the case entitled *William Bills v. Sharon Vasson [sic], et al.*, Winnemucca Tribal Court Case Number CV1003 (2002). App. 99-158. Over the years, facts have been misinterpreted or forgotten altogether.

Since the murder of its Chairman, Glenn Wasson,[2] in February 2000, the government of WIC has been in a state of turmoil. Subsequently, by virtue of his position as Vice Chairman, William Bills became Acting Chairman of WIC. Disputes erupted between Council members in particular pertaining to the Tribe's bank accounts when it was discovered that Council members were writing checks on the accounts who were not authorized to do so and were inappropriately using Tribal funds. This and other factors including enrollment of tribal members led to the split in the government into two (2) factions. *See, e.g.*, App. 99-158. These factions became known as the Wasson Group (Respondents herein) and the Bills Group (later, the Winnemucca Colony Council [WCC], Appellants herein). In an effort to stop the misuse of Tribal funds as well as other negative actions being committed by the Wasson Group, Acting Chairman Bills initiated suit in the Winnemucca Tribal Court

---

[2] The murder of Chairman Glenn Wasson remains unresolved.

requesting that a restraining order be issued on the Tribe's bank accounts including the Bank of America account that is the subject of the instant interpleader action. An Order for Permanent Injunctive Relief and Restraining Order was issued by Winnemucca Tribal Court Judge Kyle Swanson. App. 159-171. Judge Swanson held that WIC Council members consisted of William Bills as Acting Chairman, Thomas Wasson and Elverine Castro. Because the ruling was adverse to them, the Wasson Group attempted to terminate Judge Swanson. App. 117, 118.

In the meantime, on or about August 28, 2000, Bank of America initiated the underlying interpleader action requesting the District Court's intervention to ascertain which faction should have access to the Winnemucca Indian Colony funds.

Also during 2000, the Bureau of Indian Affairs ("BIA") deemed the WIC government dysfunctional for the second time in 15 years terminating the government-to-government relationship.

Judge Swanson's Order was appealed to the Inter-Tribal Court of Appeals of Nevada ("ITCAN"). On remand, the parties by agreement entered into a Stipulation appointing a mutually acceptable *pro tem* Tribal Court Judge Steven Haberfeld and certified three questions for decision: (1) the names of WIC members eligible for enrollment; (2) the identity of the [then] present legitimate and proper members of WIC Business Council; and (3) the identity of the [then] present legally authorized Tribal Judge. Judge Haberfeld issued his decision on or about May 9, 2002. App. 99-158.

The parties attempted to appeal Judge Haberfeld's decision. However, because ITCAN lacked funding to hear the case, the parties agreed to the creation of a special appellate panel to hear the appeal. App. 174-179. The panel became known as the Minnesota Panel.[3]

The Minnesota Panel issued its order overturning Judge Haberfeld's decision on or about August 30, 2002. The Panel's Decision announced Sharon Wasson, Thomas Wasson, William Bills and Elverine Castro as the legitimate Council Members. The Panel then ordered that an appointment be made to fill the chair of the deceased member (Thomas Magiera). The Panel further ordered the parties to enroll eligible members and hold an election, setting forth specific instructions for doing so. App. 72-98.

---

[3] All three judges sitting on the panel were tribal judges from Minnesota. Although the Minnesota Panel was created by the agreement of the parties, the parties' attorneys failed to consult with Council members to obtain their consent for this appointment. No resolution was passed to appoint the judges by either the Wasson Group or WCC. Additionally, because the panelists were not Nevada Indians, the appointment was contrary to the Winnemucca Law and Order Code Title 1, 1-90-010(c) which states:

> (c) Nothing in this section shall prevent the Tribal Council from entering into an agreement with other Tribes, reservations, and colonies of **Nevada Indians** whereby Tribal Court judges are shared among the various Tribal Courts for the purposes of hearing appeals. . . . (Emphasis added.)

Due to internal conflict, William Bills[4] withdrew his membership in the Tribe and resigned his Council position sometime during 2002. Mr. Bills' resignation was prompted by the revelation that he was adopted by Ermon Bills (where his membership was derived from) and that he was not of American Indian lineage, but of Filipino descent.

Following the decision, WCC filed a motion for reconsideration with the Minnesota Panel. Unfortunately, the Minnesota Panel was non-responsive to this request and all other inquiries made thereafter. In the interim, ITCAN obtained federal funding and was reconvened. Due to the Minnesota Panel's non-responsiveness, WCC filed the motion for reconsideration with ITCAN in 2004. ITCAN determined that it was the Minnesota Panel's successor court, and therefore had the authority to review any decision by the Minnesota Panel. ITCAN then granted WCC's request for reconsideration holding that ITCAN maintained subject matter jurisdiction. App. 61-71. ITCAN's resulting decision reinstated the "last legitimately elected colony council, namely the Colony Council in place in February, 2000"; *i.e.*, William Bills, Thomas Wasson, Elverine Castro and Lucy Lowry. *Id.* The reinstatement was only until a proper tribal election could be held. *Id.* ITCAN further

---

[4] Even though William Bills effectively resigned from tribal membership and did not seek to be elected as a council member thereafter, his name appears throughout the proceedings. Significantly, in 2009 Mr. Bills charted a bank in the name of the Winnemucca Indian Colony. In doing so, he held himself out to be the Chairman of the Winnemucca Indian Colony.

ordered that an official tribal enrollment list be established and further that an election be held to establish a legitimate Colony Council. ITCAN retained jurisdiction to preside over the enrollment issues and to see that a legitimate tribal election took place.

Thereafter, the Wasson Group brought suit in Federal District Court of Nevada against the ITCAN panel of judges in 2004, *Wasson v. Inter-Tribal Court of Appeals of Nevada*, Case No. CV-N-04-573. In settlement of the case, the Wasson Group and ITCAN Judges entered into a Stipulation to Reinstate the Council of the Winnemucca Indian Colony under the direction of USDC Judge, Honorable Howard McKibben. App. 180-184. The Stipulation reinstated and, more importantly, revised the terms of the Minnesota Panel Decision. *Compare*, App. 72-98 and App. App.180-184. In addition to changing terms in the decision, the Stipulation included the appointment of two council members to the Wasson Group. App. 181.

ITCAN on its own motion dismissed the case pending before it declaring it had no appellate jurisdiction and withdrew the mandates on all orders and rulings on or about May 17, 2007. App. 44-46.

WCC was not a party in the proceedings against the ITCAN Judges even though it was a real party in interest by virtue of the fact that the underlying case was initiated by WCC when it made its motion for reconsideration of the Minnesota Panel Decision. WCC was barred from taking part in settlement negotiations and the resultant Stipulation entered into by the Wasson Group and the ITCAN Judges to

its prejudice and detriment. What is even more unsettling is that the Stipulation entered into under the direction of the District Court Judge changed pertinent terms of the Minnesota Panel Decision including the appointment of council members. Interestingly, because ITCAN withdrew jurisdiction it was determined that the factions had exhausted all tribal remedies and this allowed the Wasson Group to re-submit its Motion for Summary Judgment herein. *See*, App. 30-43.

In ruling on the Wasson Group's Motion for Summary Judgment, the District Court found that because ITCAN dismissed the case for lack of jurisdiction, the parties had exhausted all tribal remedies. Based on this, the District Court determined that it had jurisdiction to enter summary judgment and distribute the bank account funds held in interpleader in this matter. In its opinion, the District Court found the Minnesota Panel Decision controlling because the panel was created by stipulation of the parties and it was to "issue a binding, non-appealable decision."[5] The District Court further stated that under principles of comity, the decision of the Minnesota

---

[5] The creation of the Minnesota Panel was brought by agreement of the parties. App. 174-179. The parties did not intend that any decision issued by the Minnesota Panel be a binding, non-appealable decision rendering it non-reviewable. App. 66. The proceedings were to be conducted pursuant to the Constitution, By-Laws and Law and Order Code of the Winnemucca Indian Colony. App. 179. The confusion arose when the Minnesota Panel declared that its findings were binding and non-appealable in its decision. *See*, App. 74.

Panel is entitled to enforcement and ruled that the funds of the Bank of America account be distributed to the "tribal council recognized by the Minnesota Panel's August 16, 2002 order." App. 30-43. WCC's subsequent Motion to Alter or Amend Judgment was denied. App. 25-29.

WCC appealed the District Court's decision to the 9th Cir. Ct. In its Memorandum Decision upholding the District Court's Orders, the 9th Cir. Ct. reprimanded prior counsel for shortcomings which included, but were not limited to, failing to raise arguments properly, or offering excuses for such failures, not providing evidence regarding important issues, failing to abide by court rules, and failing to include proper and complete excerpts of record including the most significant decision, that of the Minnesota Panel (App. 72-98). App. 1-7. In response, WCC obtained new counsel and filed a Petition for Panel Rehearing in an effort to be afforded the opportunity to rectify these shortcomings and provide the appellate court with a complete and comprehensive record for reconsideration. WCC's Petition for Rehearing was summarily denied. App. 172-173. Because of the failures referred to by the appellate court, the decision was prejudicial to WCC and not only punishes WCC, but punishes tribal members of the Winnemucca Indian Colony.

The question brought before the District Court in these proceedings was which council is the proper council to be recognized as having control over the funds interpled by Bank of America. Even though the

District Court ruled that it was not deciding who the government is but simply who gets the money, the consequence of declaring the Minnesota Panel Decision as controlling and distributing the funds to the "tribal council recognized by the Minnesota Panel's August 16, 2002, order" is that the ruling implies that those persons are the legitimate WIC Tribal Council. The Wasson Group interprets the decision in this manner.[6] *See*, App. 185-188. The ruling is significant to others such as the IBIA. *See*, App. 8-24. Surely, if the Tribal Council recognized by the Minnesota Panel's August 16, 2002, order is that which is recognized by the District Court as having control over WIC's bank account (funds), it stands to reason that the council designated by the District Court will be recognized for all other purposes.

Additionally, in declaring the Wasson Group as council for the Winnemucca Indian Colony pursuant to the original terms of the Minnesota Panel Decision, the District Court appointed a council that existed in the year 2000. This Council no longer exists. Only two (2) of the five (5) original members are still alive and one (1) (William Bills) is no longer a tribal member. To allow the remaining two (2) members of the original Wasson Group to appoint individuals to fill vacant positions as was done by the District Court in *Wasson v. Inter-Tribal Court of Appeals of Nevada*, Case

---

[6] This coincides with the earlier position that the determination of who has access to the money is dependent upon a resolution of which group constitutes the WIC Tribal Council.

No. CV-N-04-573, *supra*, is beyond any power implied in the Minnesota Panel decision and an unwarranted incursion on the sovereignty of the Tribe and the doctrine of Separation of Powers. Furthermore, under the terms of the Minnesota Panel decision, the council referred to therein was to remain as it was until enrollment and election procedures were fulfilled and a new duly elected council seated. App. 95. Significantly, the proposed decision, if implemented, leaves control to the Wasson Group's current council members, which includes individuals that do not meet the blood quantum requirement for membership in the Winnemucca Indian Colony, and one individual who is not even enrolled as a member by the Wasson Group or the Winnemucca Tribe.

WIC includes Native Americans of both Shoshone and Paiute descent who meet the blood quantum requirements and qualifications of the Constitution and Bylaws of WIC. Prior to the murder of Chairman Glenn Wasson, serious problems were arising pertaining to the enrollment of tribal members[7]. The Wasson Group, illegally acting under the color of the Business Council of the Western Band of the Western Shoshone (a tribe that is not federally recognized and does not have the necessary recognition of the BIA) (*see*, App. 160), would only enroll individuals of Shoshone descent. The enrollment application was entitled

---

[7] These enrollment issues were also factors contributing to the disputes between the factions. *See*, App. 99-158.

"Application for Membership With the Western Bands of the Western Shoshone Tribe." Importantly, those enrolled were immediate family members of the Council (the Wasson Group). The Wasson Group rejected applicants of Paiute descent. Strategically, this practice ensured that the Wasson Group would remain in power of the WIC government. Today, there are only approximately seven (7) members of those enrolled under the Wasson Group, five (5) of which sit on its council. Importantly, no member of the Wasson Group lives on the Colony or in Nevada, but reside in California. They have done nothing to benefit WIC.

In contrast, WCC has grown through the years and now consists of over 60 enrolled members. The majority of these members live on the Colony. WCC has managed the business affairs of WIC, including the smoke shop. Proceeds from the smoke shop are used to benefit WIC members as well as those who live on the Colony that are not members. WCC has made improvements to the land and buildings, purchased furniture and fixtures, set up distribution of commodity foods, worked with a neighboring tribe to institute diabetes education, and the like.

Since the disputes arose between council members resulting in the division of the factions and protracted litigation commenced, various decisions and orders have been issued, many conflicting with others. Those referenced herein are not inclusive of all that have been issued, nor do the facts herein detail all the events that have taken place over the years. Prevalent in the rulings are issues

surrounding proper enrollment of tribal members and a bona fide election by these members for a council of their choosing.

REASONS FOR GRANTING THE PETITION

I. A PRINCIPAL MUST BE PUT IN PLACE BY THIS COURT FOR THE RESOLUTION OF CASES OF THIS TYPE. WITHOUT A CONSISTENT PRECEDENT ACROSS THE COUNTRY, THESE TYPES OF CASES CONTINUE TO GROW. A CLEAR AND CONCISE PRINCIPAL MUST BE ANNUNCIATED BY THIS COURT TO ELIMINATE FUTURE DISPUTES FLOUNDERING WITHOUT DIRECTION.

The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, mandates a policy of Indian self-determination and self-government. A tribe possesses an inherent and exclusive power over matters of internal tribal governance. *See*, *Nero v. Cherokee Nations*, 892 F.2d 1457 (10th Cir. 1989). As such, it is the policy of federal courts and the BIA not to become involved in the internal affairs of tribal governments. Unfortunately, this policy leaves tribal members or potential tribal members without any recourse when a tribal government splits into disputing factions.

From the time the BIA declared WIC dysfunctional and terminated government-to-government relations with it in 2000, many attempts have been

made by both factions to be recognized as the legitimate government of WIC primarily based on various court decisions, including the District Court's. The BIA still refuses to recognize either faction. App. 8-24. Because recognition by the BIA cannot be obtained, WIC cannot enter into contracts under P.L. 93-638 (Indian Self Determination Act) to receive federal funding and benefits, nor receive Indian Health Services (IHS), nor apply for grant funding from any federal agency, nor apply for any funding or programs for housing from the Department of Housing and Urban Development (HUD) or the Environmental Protection Agency (EPA). The lack of a recognized government also prevents WIC from authorizing IHS to construct needed infrastructure for water lines and sewer lines on the Colony for existing trailers and homes. Needless to say, WIC members are irreparably harmed by this.

This case is not unique. Disputes involving opposing tribal factions have markedly increased in the past years, are becoming more common, and, in some cases, have turned violent. Problems are enhanced by the fact that there are no principals in place for guidance in resolution of faction disputes. Federal policy of non-interference in tribal affairs leaves parties entangled in the disputes putting the tribe in a state of chaos and turmoil. A clear and concise principal must be put in place by this Court in order to give guidance for resolution to eliminate and prevent future disputes of tribal factions from floundering without direction.

II. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS MUST BE OVERTURNED AND THE PARTIES RETURNED TO THE POSITION THEY WERE IN PRIOR TO THE RULING SO THAT A PROPER AND FAIR ENROLLMENT AND VALID ELECTION MAY BE HELD.

Pursuant to 25 U.S.C. § 450b(l), a tribal organization is the

> recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled sanctioned, or chartered, by such governing body or which is **democratically elected** by the adult **members** of the Indian **community** to be served by such organization and which includes the **maximum** participation of Indians in **all** phases of its activities. (Emphasis added.)

The Wasson Group only includes a minority of tribal members who are selfish, greedy and dominating. The goal is to have a government that is led by a council democratically elected by the majority of tribal members, and ruled by consensus.

When contending parties invoke the process of the courts, however, it becomes [their] unsought responsibility to resolve the federal and constitutional issues the judicial systems have been forced to confront. *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000). The decision in this case merely deciding who gets the funds held in interpleader has left the parties without direction as to the legitimate governing body of WIC. To prevent injustice and

prejudice to tribal members of WIC, the decision of the 9th Cir. Ct. must be overturned and the status quo must remain until enrollment of tribal members can be made in good faith, and a bona fide election be held wherein tribal members democratically elect a council of their choosing pursuant to WIC's Constitution and Bylaws. Until these actions occur, there will not be recognition of the Winnemucca Indian Colony by the BIA and it will remain ineligible for federal funding, healthcare services, HUD housing and other benefits that are or may become available.

The funds from the Bank of America account belong to the Winnemucca Indian Colony. They are not the personal income of the Wasson Group and should not be placed in the hands of the Wasson Group because they are not the duly elected and recognized government of the Winnemucca Indian Colony. Returning the parties to their position prior to the 9th Cir. Ct.'s ruling is the only incentive that will force the Wasson Group to work with WCC in a positive manner and move forward as it should have throughout the years.

CONCLUSION

Petitioner WCC respectfully requests that certiorari be granted and that the lower Court's decision be overturned returning the parties to the position they were in prior to freezing the funds from the Bank of America account until enrollment and election issues are resolved, and principals be established by this

Court for resolution of cases such as this wherein disputes between tribal government factions flounder without direction.

DATED this 7th day of February, 2011.

Respectfully submitted,

MITCHELL C. WRIGHT, ESQ.
Counsel for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BANK OF AMERICA, N.A., a Delaware corporation,

Plaintiff,

v.

KYLE SWANSON,

Defendant-Appellant,

WILLIAM BILLS; WINNEMUCCA COLONY COUNCIL,

Defendants-Counter-claimants-Appellants,

SHARON WASSON; et al.,

Defendants-Counter-claimants-Appellees.

No. 08-16146

D.C. No. 3:00-cv-004500-RCJ

MEMORANDUM*

(Filed Oct. 14, 2010)

Appeal from the United States District Court
for the District of Nevada
Robert C. Jones, District Judge, Presiding
Submitted October 4, 2010**
San Francisco, California

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: FERNANDEZ and SILVERMAN, Circuit Judges, and DUFFY, District Judge.***

Appellants – William Bills and the Winnemucca Colony Council and its Chairman Linda Ayer (the "Bills Group") – appeal from the district court's grant of summary judgment in favor of Appellees – Sharon Wasson and the Winnemucca Indian Colony Council (the "Wasson Group") – awarding the approximately $400,000.00 held in a Bank of America account to Appellees. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

This case began when Winnemucca Indian Colony Council Chairman Glenn Wasson was murdered on February 22, 2000. On August 28, 2000, Bank of America filed a complaint in interpleader pursuant to Rule 22 of the Federal Rules of Civil Procedure to resolve a dispute between the tribal factions as to who had authority to use a bank account opened in the name of "Winnemucca Indian Colony." Years of protracted litigation ensued in tribal and federal courts. Eventually, through participation in the Ninth Circuit's mediation process, on August 1, 2002, the parties stipulated to the appointment of a special appellate panel to hear argument and to issue a binding, non-appealable decision. The special appellate panel consisted of a panel of judges from the Sioux Nation (the "Minnesota Panel").

*** The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

The Minnesota Panel issued its decision on August 16, 2002 (the "Minnesota Panel Order"). The Minnesota Panel found that the valid tribal council included the following people: Sharon Wasson, Thomas Wasson, William Bills, Elverine Castro, and Thomas Magiera until his death. As such, the panel stated that "all subsequent activities of the Bills Council are found to be unconstitutional and invalid." The Wasson Group moved for summary judgment based on the Minnesota Panel Order on August 30, 2002.

The district court denied the Wasson Group's motion without prejudice and afforded the Bills Group almost five years to further exhaust tribal remedies. During that time, the Inter-Tribal Court of Appeals issued several orders, which are not in the record in full before the district court or on appeal, addressing the issues in this case. However, on May 17, 2007, the Inter-Tribal Court of Appeals, sua sponte, issued an order dismissing the case stating that it had no appellate jurisdiction. The Wasson group renewed its motion for summary judgment based on the Minnesota Panel Order. Concluding that the parties had exhausted their tribal remedies and that the decision of the Minnesota Panel was binding and non-appealable, the district court granted the Wasson Group's motion for summary judgment and denied the Bills Group's cross motion. This timely appeal followed.[1]

---

[1] This court asked the parties to brief whether this appeal is timely under Rule 6(a) of the Federal Rules of Civil Procedure. After careful consideration, we conclude that under the version

(Continued on following page)

This court reviews a district court's grant of summary judgment de novo. *Brodheim v. Cry,* 584 F.3d 1262, 1267 (9th Cir. 2009). Generally, the rule of tribal exhaustion requires that federal courts give precedence to tribal courts to determine in the first instance the extent of their own jurisdiction to hear a particular case. *See Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14 (1987); *Nat'l Farmers Union Ins. Co. v. Crow,* 471 U.S. 845, 856-57 (1985). Federal courts must enforce tribal court decisions under principles of comity, unless "the tribal court either lacked jurisdiction or denied the losing party due process of law." *AT&T Corp. v. Coeur D'Alene Tribe,* 295 F.3d 899, 904 (9th Cir. 2002). A judge may dismiss a case sua sponte for lack of jurisdiction, but that power is subject to the demands of due process. *Cal. Diversified Promotions, Inc. v. Musick,* 505 F.2d 278, 280 (9th Cir. 1974). In reviewing a decision to dismiss for lack of jurisdiction sua sponte, the reviewing court must consider, "all of the circumstances . . . in determining whether the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing renders the dismissal void." *Id.* (internal quotation marks and citation omitted).

We conclude that the parties exhausted their tribal remedies. The Inter-Tribal Court of Appeals

---

of Rule 6(a)(2) that was in effect at the time that the Bills Group filed its Rule 59(e) motion, the appeal is timely, and, as such, we have jurisdiction to consider it on the merits. *See* FED. R. CIV. P. 6(a)(2) (effective until Dec.1 2009) (West 2009).

determined that it did not have jurisdiction. Under the circumstances of this case, the parties have been afforded more than due process in both tribal and federal court. And, in any event, the Bills Group waived its due process argument by failing to raise it properly before the district court or offer any excuse for such failure. *See Rains v. Flinn (In re Rains),* 428 F.3d 893, 902 (9th Cir. 2005). Thus, we recognize the Inter-Tribal Court of Appeals's dismissal based on principles of comity. See *Coeur D'Alene Tribe,* 295 F.3d at 904.

Further, we agree with the district court to the extent that it recognized the Minnesota Panel Order on principles of comity; however, we do so on slightly different grounds. *See Ramirez v. Castro,* 365 F.3d 755, 762 (9th Cir. 2004). First, the Wasson Group submitted credible evidence that both parties and the Minnesota Panel considered the Minnesota Panel Order binding and non-appealable. The Bills Group provided no evidence to the contrary. *See Rivera v. Nat'l R.R. Passenger Corp.,* 331 F.3d 1074, 1078 (9th Cir. 2003). Further, the decision rendered by Tribal Judge Swanson that the Bills Group urges this court to enforce is not entitled to recognition as it "is inconsistent with the parties' contractual choice of forum. . . . ", namely the Minnesota Panel. *See Wilson v. Marchington,* 127 F.3d 805, 810 (9th Cir. 1997). Thus, we affirm the district court's judgment recognizing the Minnesota Panel Order.

Finally, as a matter of principle, counsel are reminded that this court has rules that are to be

followed. If something is to be relied upon by this court, it must be entered into the record of the trial court and reproduced in the Excerpts of Record as required by 9th Circuit Rule 30-1.3. *See* 9TH CIR. R. 30-1.3. Rule 28 of the Federal Rules of Appellate Procedure requires parties to support factual allegations with appropriate references to the record. *See* FED. R. CIV. P. 28. In egregious cases, we have summarily affirmed the trial court's judgment and dismissed the appeal when parties have acted in complete disregard of these rules. *See, e.g., Cmty. Commerce Bank v. O'Brien (In re O'Brien),* 312 F.3d 1135, 1136 (9th Cir. 2002); *N/S Corp. v. Liberty Mut. Ins. Co.,* 127 F.3d 1145, 1146 (9th Cir. 1997).

Here, the Bills Group did not include an Excerpts of Record with their opening brief. The Bills Group's opening brief lacks appropriate record citations. Had the Wasson Group not filed a Supplemental Excerpts of Record, we would have to scour the district court record for the decisions appealed from and other pertinent portions of the record. Even in the district court record, many of the exhibits, including vital tribal court rulings, were submitted only in part. For example, the Bills Group only submitted three selective pages of the inter-Tribal Court of Appeals's March 19, 2004 decision on the jurisdiction of the Minnesota Panel, and no party provided that decision in its excerpts of record to this court. Due to the complete disrespect for the rules of this court and the rule of law, we seriously considered summarily dismissing this appeal. However, on the unique facts of

this case, we concluded that the clients should not be punished for the failings of their attorneys.

To the extent that the Bills Group made arguments not directly addressed in this opinion, having been fully considered by this court, we conclude that they completely lack merit.

AFFIRMED.

[SEAL]

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

SHARON WASSON, THOMAS WASSON, WILLIAM BILLS, JUDY ROJO, AND ELVERINE CASTRO,	)	Order Vacating Decision and Remanding
Appellants,	)	
v.	)	Docket No. IBIA 10-050
ACTING WESTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	December 17, 2010

Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro, in their capacity as Members of the Winnemucca Indian Colony Council (Colony Council or Council) and as individuals (Appellants), appealed to the Board of Indian Appeals (Board) from a December 8, 2009, decision (Decision) by the Acting Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director's decision was issued after the Board instructed the Regional Director to issue a decision in

response to Appellants' request for recognition as the Colony Council, the elected governing officials of the Winnemucca Indian Colony of Nevada (Tribe or Colony). Appellants' request for recognition was made in connection with their allegation that Tribal lands were being occupied without the Tribe's permission and that BIA had an obligation to respond to the trespass. *See Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro v. Western Regional Director*, 50 IBIA 342, 352 (2009) (*Wasson V*).

The Regional Director's decision, in response to the Board's order, consists in substance of a single paragraph stating two unexplained conclusions.[1] First, the Regional Director stated that "based on the information currently available, I hereby affirmatively do not recognize or acknowledge or certify or approve these individuals, identified in [Appellants'] February 26, 2007 request as the duly elected officers of the Winnemucca Indian Colony." Decision at 1. The Decision provides no reasoning for this conclusion and refers to no evidence or "currently available" information that was considered or evaluated in reaching this conclusion. Second, the Regional Director stated – also without explanation – that there was no source of authority under which BIA has an affirmative obligation to decide whether to recognize any individuals as the Tribe's leaders and that such action by

[1] The Decision consists of a one-paragraph introduction, one paragraph announcing the Regional Director's conclusions, and three paragraphs providing appeal rights.

BIA could be seen as an intrusion into tribal sovereignty. *See id.* The Decision does not mention Appellants' allegation of trespass on tribal lands.

We vacate the Decision and remand the matter for further proceedings because the Decision contains no reasoned analysis nor an identification or discussion of any evidence upon which the Regional Director relied or purported to rely in making his decision not to recognize Appellants as the Colony Council. It is not even clear whether, by stating that he "affirmatively" did not recognize Appellants as the Colony Council, the Regional Director intended to determine that Appellants had not demonstrated that *they* were entitled to be so recognized, or whether the Regional Director intended to determine only that he was not required to decide whether to recognize *any individuals* as the Tribe's leadership, and thus was "affirmatively" not recognizing Appellants in that context. What is clear is that the Regional Director did not comply with the Board's order to address Appellants' request for recognition in the context of their trespass allegation. The Board's prior order required, and Appellants were entitled to, a substantive decision explaining why the Regional Director was declining to recognize them as the Tribe's leaders or, in the alternative, explaining why a decision by BIA regarding tribal leadership was not required in order for BIA to respond to Appellants' allegations of trespass on tribal lands.

Background

The protracted history of the governance dispute within the Tribe, and BIA's obligation, or lack of an obligation, to make a decision about which individuals to recognize as the Tribe's leadership for government-to-government purposes, has been recounted in previous Board decisions and need not be repeated here. *See Wasson V*, 50 IBIA at 344-50; *Wasson v. Western Regional Director*, 42 IBIA 141, 141-152 (2006) (*Wasson IV*).[2] The Tribe has two competing factions, currently referred to as the "Wasson" faction, represented by Appellants, or possibly by their claimed successors in office, and the "Ayer" faction (formerly referred to as the "Bills group" and "Leyva group"). *See id.* at 142 n. 3. For several years, BIA has not recognized either or any faction as constituting the Colony Council or as representing the Tribe for government-to-government purposes.

In *Wasson IV,* the Board affirmed a decision by the Regional Director not to recognize the Wasson faction as the Colony's Council. We did so because the appellants in that case failed to identify any federal purpose for which recognition of a Council was required. 42 IBIA at 154. In addition, the Board affirmed the Regional Director's conclusion in that case that the Wasson faction had not exhausted tribal

---

[2] *See also Wasson v. Acting Western Regional Director*, 39 IBIA 174 (2003) (*Wasson III*); *Wasson v. Western Regional Director*, 38 IBIA 255 (2002) (*Wasson II*); and *Wasson v. Western Regional Director*, 38 IBIA 205 (2002) (*Wasson I*).

remedies for determining the identity of the legitimate Council. *See id.* At the time *Wasson IV* was decided, the two factions were involved in several tribal processes for resolving the dispute over the Colony Council. In addition, both tribal factions had been joined in an interpleader action brought by the Bank of America, in which the court also recognized that several tribal processes on the issue were pending, including one in which the factions had stipulated to the appointment of a special appellate panel of tribal judges (the "Minnesota Panel") to issue a binding, non-appealable decision to resolve the dispute. *See id.* at 146, 154; *Bank of America, N.A. v. Bills* (*Bank of America I*), No. 3:00-cv-00450-BES-VPC, 2008 WL 682399, at *2 (D. Nev. Mar. 6, 2008).

In *Wasson V*, based on Appellants' allegation of trespass on tribal lands, the Board concluded that Appellants *had (*in contrast to *Wasson IV)* satisfied their burden to show that their request to be recognized was ripe for a decision by BIA on the merits. *Wasson V* was an appeal from inaction, *see* 25 C.F.R. § 2.8, and the Board specifically rejected the Regional Director's assertion that "he need not issue any decision because there is no need for Federal recognition of a tribal government for purposes of the government-to-government relationship." *Wasson V*, 50 IBIA at 352. In rejecting that assertion, the Board found that Appellants' allegation that tribal lands were being illegally occupied constituted a claim that was sufficient to refute the Regional Director's argument, in the context of a § 2.8 appeal, that he did not

need to take any action or issue a decision addressing the merits of Appellants' request.

In *Wasson V*, the Board also noted developments in the *Bank of America* litigation, specifically the district court's decision. *See* 50 IBIA at 350. In its decision, the district court concluded that tribal remedies had been exhausted. Applying the rule that federal courts must recognize and enforce tribal court judgments under principles of comity, the court found that the decision of the Minnesota Panel was controlling. *Bank of America I*, 2008 WL 682399, at *5-6. The Minnesota Panel had concluded in 2002 that the members of the Colony Council consisted of Sharon Wasson, Thomas Wasson, William Bills, and Elverine Castro, plus one vacancy, for which the Panel had ordered the Council to appoint a successor to fill the unexpired term. *See id.* at *2; *Wasson IV*, 42 IBIA at 146. At the time *Wasson V* was issued, the Ayer (then "Bills") faction had appealed the district court's decision and the Regional Director argued that the court's decision was not determinative. *See Wasson V*, 50 IBIA at 350. Because *Wasson V* was an appeal from inaction, which does not encompass the underlying merits, the Board only noted, but did not further discuss, the *Bank of America I* decision.[3]

---

[3] Recently, the U.S. Court of Appeals for the Ninth Circuit affirmed *Bank of America I*. *See Bank of America N.A. v. Swanson*, No. 08-16146, 2010 WL 4025788 (9th Cir. Oct. 14, 2010) (*Bank of America II*).

As noted earlier, in response to the Board's directive to issue a decision on the merits addressing Appellants' request for recognition, the Regional Director issued, in substance, a single conclusory paragraph, stating that he did not recognize Appellants "based on the information currently available" and that he was not required to recognize any tribal leaders for the Colony. When Appellants filed this appeal, the Board ordered the Regional Director to show cause why the Board should not summarily vacate the Decision and remand the matter. Order For Regional Director to Show Cause (OSC), Mar. 18, 2010. In the OSC, the Board noted that the Decision did not "provide any fact-based analysis to support a decision not to recognize either Appellants[ ] or anyone else as constituting the political leadership of the Tribe, whether on an interim basis or otherwise, for government-to-government purposes." OSC at 3. The Board also noted that "it would seem that an allegation of trespass on tribal lands by a group claiming to be the Tribe's leadership might well require a decision by BIA whether or not it recognizes the group as the Tribe's leadership, for government-to-government, or trustee-to-beneficiary, purposes." *Id.* n.3.

Responding to the Board's OSC, and defending his one-paragraph decision against summary vacatur, the Regional Director filed a 20-page brief. In his response, the Regional Director seeks affirmance of his decision, arguing that (1) the Decision complied with the Board's instructions in *Wasson V* because the Board did not direct BIA how to decide the matter,

but only ordered him to decide whether to accept or reject Appellants' claim that they constitute the Colony Council, and the Decision is supported by substantial evidence; (2) because Appellants do not identify the identity of the alleged trespassers or the location of the alleged trespass, BIA is unable to determine whether any acts of trespass or improper occupation of Colony lands is occurring; (3) BIA may not get involved in a tribal leadership dispute unless there is no tribal forum that can resolve the dispute; and (4) an evaluation of Appellants' trespass allegations might require BIA to decide who is or is not a member of the Colony, which would impermissibly intrude on internal tribal affairs.

None of the Regional Director's arguments convince us that his Decision should be sustained. We address each argument in turn.

First, while we agree that *Wasson V* did not direct BIA how to decide the issue of whether or not to recognize Appellants as the Colony Council, it does not follow that a Decision summarily rejecting Appellants' request, with no explanation, analysis, or discussion of the evidence, either complied with the Board's directive or can be sustained. The Regional Director fails to identify, either in his Decision or in his response to the OSC, the evidence or law upon which he purportedly relied in refusing to recognize Appellants, on an interim basis or otherwise, as the Colony Council, in light of the trespass allegations. Although there is evidence in the record to support a determination that Elverine Castro cannot

be considered a member of the Colony Council – she died in 2007 – we are unable to determine what evidence the Regional Director relies upon as "substantial evidence" to support his decision with respect to the remaining Appellants. In some cases, evidence in the administrative record that is relevant to reasoning in a BIA decision may be identified on appeal; a decision need not exhaustively identify in detail all of the evidence relied upon. In the present case, however, the lack of reasoning in the Decision largely precludes us from determining what evidence might provide support for the Decision. Moreover, because the Regional Director issued the Decision without providing the parties with any opportunity to provide more current information, or supplemental arguments – despite the fact that Appellants' request for action dated back to 2007 – the Regional Director's assertion that his decision is based on information "currently available" is questionable.[4]

---

[4] The original administrative record submitted to the Board by the Regional Director, and certified by him as containing all documents utilized in the Decision, consisted of three documents: (1) a copy of the Board's January 28, 2010, pre-docketing notice; (2) a copy of the Regional Director's December 8, 2009, decision and cover sheet for faxing the decision to Appellants' counsel; and (3) a copy of Appellant's November 16, 2007, notice of appeal for their previous appeal to the Board. Only in response to the Board's OSC did the Regional Director submit documents from the record developed in the previous proceedings, as required by 43 C.F.R. § 4.335(a). Thus, it is far from clear whether the Regional Director even reviewed the previous record of proceedings before issuing the Decision.

Second, we reject the Regional Director's argument that Appellants' failure to identify the alleged trespassers and the location of the alleged trespass provides us with a basis to uphold his Decision. As a threshold matter, we note that the Decision does not even address the trespass issue, and thus there is no evidence that the Regional Director actually considered a failure by Appellants to identify the alleged trespassers or to identify the location of the alleged trespass as relevant. If he did, he did not provide Appellants with an opportunity to submit additional information. Moreover, even on appeal, the Regional Director has not explained why BIA's duty to investigate alleged trespass on Indian trust lands is dependent upon the complaining party providing the identity of the alleged trespassers.

Possession of Indian trust land may only occur pursuant to lawful authority. *See, e.g.*, 25 C.F.R. § 162.104 (When is a lease needed to authorize possession of Indian Land?). If a lease is required, and possession is taken without a lease by a party other than an Indian landowner, BIA "will treat the unauthorized use as a trespass." *Id.* § 162.106(a). Even if a lease is not required, there must be some other basis for finding lawful occupancy of Indian trust land. The Regional Director argues that Appellants' allegations of occupancy of tribal lands by "non-Indians" and "non-members" are overly vague and that Appellants failed to identify with specificity which lands they were referring to. That may have been grounds for the Regional Director to have demanded that Appellants

provide additional information, but it does not, without more, provide us with a basis to affirm a decision that ignored the trespass allegation altogether – particularly in light of our directive in *Wasson V* and BIA's trusteeship of tribal trust lands.

Third, while the Regional Director devotes a substantial portion of his argument to a discussion of cases in which courts and the Board have counseled against BIA unnecessarily intruding in internal tribal government disputes, he fails to explain how those principles are applicable in the specific factual context presented by this case. We have no quarrel with the Regional Director's general statements, in the abstract, and we agree, as we held in *Wasson IV*, that recognition of tribal government officials is not required if it is not needed for government-to-government purposes. *See also George v. Eastern Regional Director*, 49 IBIA 164, 186-87 (2009), and cases cited therein. But the allegation of trespass on tribal lands in the present case would appear to require at least some inquiry and decision by BIA, which may or may not require a determination that the group making the allegation is the Tribe's Council. Moreover, with respect to principles of deference to tribal processes, the Regional Director fails to address the *Bank of America I* decision, which the Board noted in *Wasson V* as potentially relevant and which has now been affirmed by the court of appeals.

Fourth, the Regional Director attempts to defend his Decision by arguing that an investigation of Appellants' trespass allegation might entangle BIA in

an internal membership dispute, and impermissibly require BIA to decide whether certain individuals are members of the Tribe. But the Regional Director cites no federal or tribal law that grants general authority, or specific permission, for individual members of the Tribe to take possession of the Tribe's lands. Thus, the Regional Director has not explained how a member-nonmember distinction is even legally relevant to Appellants' trespass allegation. And even if it is relevant, it does not necessarily follow that BIA is automatically precluded, as the Regional Director suggests, from making a decision to address Appellants' trespass allegation.[5]

In summary, Appellants, purporting to constitute the Colony Council, alleged that trespass was occurring on tribal lands. Faced with that allegation, the Regional Director has not explained, either in his Decision or on appeal, why BIA was not required to decide, *and explain the basis for a decision*, (1) that Appellants do not constitute the Colony Council and do not represent the Tribe, and thus regardless of whether or how BIA acts upon the allegations, BIA

---

[5] If a trespass determination is dependent upon a finding of an individual's tribal membership status, and if that membership status is disputed, BIA may well have a certain degree of discretion in deciding whether to make a BIA determination of the individual's status for purposes of protecting trust property against trespass, or deciding whether to take enforcement action pending the Tribe's resolution of a membership issue.

owes no duty to Appellants;[6] (2) that Appellants do constitute the Colony Council and do represent the Tribe; (3) that, whether or not Appellants constitute the Colony Council and represent the Tribe, there is no trespass occurring because the individuals occupying the Tribe's lands are doing so under the authority of federal or tribal law unrelated to permissive use that is dependent upon deciding who constitutes the lawful Colony Council; or (4) that some other response by BIA to the trespass allegation is appropriate.

As noted above, it may be possible for the Regional Director to address Appellants' trespass allegation without having to decide whether Appellants' faction should be considered, on an interim basis or otherwise, as representing the Tribe as landowner.[7]

---

[6] A determination of whether Appellants constitute the Colony Council could also be relevant, for example, if certain use or occupancy is dependent upon permission from the Colony Council.

[7] The caption of Appellants' Notice of Appeal identifies Appellants as "Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo and Elverine Castro, in their capacity as Members of the Winnemucca Indian Colony Council and as individuals," but the appeal itself purports to request relief on behalf of the Tribe, *see* Notice of Appeal at 10, and it identifies a different composition of the Colony Council elsewhere in the Notice of Appeal, *see id.* at 9. Moreover, Appellants acknowledge that Elverine Castro was no longer living when they filed this appeal with the Board. Under the circumstances, we leave it for the remand proceedings for Appellants, or their purported successors in office, to clarify in whose names and in what capacities they request action by BIA, and we leave it for the Regional Director to address such issues, as appropriate, in a decision.

But if the Regional Director is required to make a recognition decision for purposes of the trustee-beneficiary relationship or for government-to-government purposes, he must address *Bank of America II* decision, as well as any recent elections purportedly held by the Tribe.[8] Considering the time that has elapsed since Appellants made their request for action to the Regional Director, it not sufficient for the Regional Director to summarily decide the matter, on remand, without affording Appellants and interested parties an opportunity to identify the current basis for their

---

[8] On December 10, 2010, the Board received a copy of a memorandum from the Western Nevada Agency Superintendent to the Regional Director, informing the Regional Director of the election held by Appellants' faction, and also noting that the pendency of Appellants' appeal to the Board precluded BIA from taking action to decide whether or not to recognize that election. In addition, on December 6, 2010, the Board received a brief from the Ayer faction. The Ayer faction's brief was submitted without leave from the Board and outside the time period allowed for any briefing. For that reason, the Board declines to consider the Ayer faction's brief, except for the limited purposes of noting that each faction apparently recently has held competing elections. The Ayer faction's brief does not address *Bank of America II*, which presumably is binding on both factions.

The present appeal is limited to reviewing the Regional Director's Decision that was made in the context of Appellants' trespass allegation. It is unclear whether there are separate matters that would now require BIA to make a tribal government recognition decision, either for trustee-beneficiary or government-to-government purposes, on an interim basis or otherwise. Although our order of vacatur and remand pertains to the Decision, the return of jurisdiction to BIA allows it to consider and decide other issues, as appropriate.

claims relating to the trespass allegation or to the tribal leadership issue.

Conclusion

The Regional Director's Decision failed to comply with the Board's directive in *Wasson V*, and contains no reasoned analysis nor an identification or discussion of any evidence upon which the Regional Director relied or purported to rely in making his decision not to recognize Appellants as the Colony Council, in the context of Appellants' allegation that trespass was occurring on tribal lands. Therefore, we vacate the Decision and remand the matter. On remand, the Regional Director shall afford Appellants an opportunity to submit supplemental briefing and evidence relevant to Appellants' trespass allegation, and shall afford the Ayer faction (and any other interested parties) an opportunity to respond.[9]

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the Regional Director's December 8, 2009, Decision and remands the matter for further proceedings consistent with this order.

---

[9] In light of the passage of time since Appellants made the trespass allegation, it is unclear whether this issue may be moot. We leave that issue for BIA to determine in the first instance, on remand, after affording all interested parties an opportunity for briefing.

I concur:

/s/ Steven K Linscheid
Steven K. Linscheid
Chief Administrative Judge

/s/ Debra G. Luther
Debra G. Luther
Administrative Judge

Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro v. Acting Western Regional Director, BIA
Docket No. IBIA 10-050
Order Vacating Decision and Remanding
Issued December 17, 2010
52 IBIA 353

Treva J. Hearne Esq.
Hager and Hearne
for Sharon Wasson, et al.
245 E. Liberty, Ste. 110
Reno, NV 89512
BY CERTIFIED MAIL

Donald K. Pope Esq.
1188 California Ave.
Reno, NV 89509

Mitchell C. Wright, Esq.
Law Offices of Mitchell C. Wright
325 W. Liberty Street
Reno, NV 89501-2011

Superintendent
Western Nevada Agency, BIA
311 East Washington Street
Carson City, NV 89701

Western Regional Director
Bureau of Indian Affairs
2600 N. Central Ave.
Suite 400, 4th Floor
Phoenix, AZ 85004

Sonia D. Overholser Esq.
Office of the Field Solicitor
U.S. Dept. of the Interior
401 West Washington St., SPC 44
Phoenix, AZ 85003-2151

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BANK OF AMERICA, N.A. a Delaware corporation, Plaintiff, v. WILLIAM BILLS; SHARON WASSON; ELVERINE CASTRO; THOMAS W. MAGIERA (deceased); THOMAS R. WASSON; and WINNEMUCCA INDIAN COLONY COUNCIL, Defendants.	3:00-cv-00450-BES-VPC **ORDER**

Currently before this Court is Defendants Winnemucca Colony Council and Chairman Linda Ayer's (collectively referred to herein as the "Bills Group") Motion to Alter or Amend Judgment (#217), filed on March 6, 2008. Defendants Winnemucca Indian Colony and Chairman Thomas Wasson (collectively referred to herein as the "Wasson Group") filed an Opposition (#219) on April 4, 2008.

Also before this Court is a Motion for Stay of Execution (#218), filed by the Bill's Group on March 19, 2008. The Wasson Group filed an Opposition (#220) on April 4, 2008.

Discussion

On March 6, 2008, this Court entered an Order granting the Wasson Group's Motion for Summary Judgment (#215). On March 19, 2008, the Bills Group filed a Motion to Alter or Amend Judgment (#217) and a Motion for Stay of Execution (#218). According to the Bills Group, the Court should alter or amend its March 6, 2008 Order because "there is a need to correct a clear mistake of both law and fact." (Motion to Alter or Amend Judgment (#217) at p. 1).

Rule 59(e) of the Federal Rules of Civil Procedure allows for a motion to alter or amend a judgment. A motion to alter or amend under this rule is appropriate "if the district court: (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 n.1 (9th Cir. 2005). In regard to newly discovered evidence, the Ninth Circuit has held that "[t]o justify an amendment" the moving party must "show that the evidence was discovered after the judgment, that the evidence could not be discovered earlier through due diligence, and that the newly discovered evidence is of such a magnitude that had the court known of it earlier, the outcome would likely have been different." *Dixon v. Wallowa County*, 336 F.3d 1013, 1022 (9th Cir. 2003).

In this case, the Bills Group first argues that the March 6, 2008 Order should be amended or altered

because there is new evidence that tribal remedies have not been exhausted. Specifically, the Bills Group argues that a 25 CFR court in and for the Winnemucca Indian Colony has jurisdiction over this matter. In this regard, several days after the Court entered its March 6, 2008 Order, the Bills Group sent a Motion to Recognize Tribal Government to an individual named Theresa Maldonado to file with the 25 CFR court for the Winnemucca Indian Colony. (Motion to Alter or Amend Judgment (#217) at Exhibit 2). However, aside from sending a letter to this individual, the Bills Group has provided no evidence that a 25 CFR court is currently active for the Winnemucca Indian Colony.[1] The Bills Group did not argue that the 25 CFR court was active in any of its previous arguments and the Wasson Group has provided a declaration that the Bureau of Indian Affairs informed them that the 25 CFR court for the Winnemucca Indian Colony has been withdrawn. (Opposition to Motion to Alter or Amend judgment (#219) at p. 7).

In addition to the foregoing, 25 CFR § 11.104(b) states that "[u]nless otherwise provided by a resolution or ordinance of the tribal governing body of the tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction, no Court of Indian Offenses may adjudicate an election dispute or

---

[1] This Court recognizes that 25 CFR § 11.100(a)(15) lists the Winnemucca Indian Tribe in the listing of Courts of Indian Offenses. However, the Bills Group has provided no evidence that this court is currently available to settle this dispute.

take jurisdiction over a suit against the tribe or adjudicate any internal tribal government dispute." This case clearly involves an internal tribal government dispute and thus falls within the jurisdictional prerequisite of 25 CFR § 11.104(b). The Bills Group has provided no evidence of any resolution or ordinance by any tribal governing body granting a 25 CFR court jurisdiction to adjudicate this matter. In fact, at the time the Winnemucca Indian Colony was added to 25 CFR § 11.100 in 2005, this dispute about the proper governing council was well under way and there was no recognized governing body to pass such an ordinance or resolution.

Second, the Bills Group argues that the March 6, 2008 Order should be amended or altered because the Court "in deciding to choose between the Swanson order and the Minnesota panel decision, has decided to choose a government for the Winnemucca Indian Colony." (Motion to Alter or Amend Judgment (#217) at p. 4).

Federal courts do not have jurisdiction to determine tribal governments or to decide issues solely involving intra-tribal politics. *U.S. Bancorp v. Ike*, 171 F.Supp.2d 1122, 1125-26 (D.Nev. 2001) (citing *Shenandoah v. United States Dep't of the Interior*, 159 F.3d 708, 712-13 (2nd Cir. 1998)). However, "federal courts must recognize and enforce tribal court judgments under principles of comity." *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002).

This Court decided in its March 6, 2008 Order that the decision by the Minnesota Panel was controlling in this matter. As such, the Court enforced a tribal court decision under principles of comity. The Court did not decide a government for the Winnemucca Indian Colony. The Minnesota Panel had jurisdiction to hear and decide this case. That jurisdiction, which was created by stipulation of the parties, was not affected by the Inter-Tribal Court of Appeal's dismissal. As such, it is the controlling decision in this matter. Because that decision is controlling, it is entitled to enforcement in this Court under principles of comity.

Thus, based on the foregoing, the Court will not alter or amend its March 6, 2008 Order.

Conclusion

Based on the foregoing, IT IS ORDERED that the Bills Group's Motion to Alter or Amend Judgment (#217) is DENIED.

IT IS FURTHER ORDERED that the Bills Group's Motion for Stay of Execution (#218) is DENIED.

DATED: This 29th day of April, 2008.

/s/ B Sandoval
BRIAN SANDOVAL
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BANK OF AMERICA, N.A. a Delaware corporation, Plaintiff, v. WILLIAM BILLS; SHARON WASSON; ELVERINE CASTRO; THOMAS W. MAGIERA (deceased); THOMAS R. WASSON; and WINNEMUCCA INDIAN COLONY COUNCIL, Defendants.	3:00-cv-00450-BES-VPC **ORDER**

Currently before this Court are Defendants Winnemucca Indian Colony and Chairman Thomas Wasson's (collectively referred to herein as the "Wasson Group") Motion for Summary Judgment (#147), filed on August 30, 2002, and the Wasson Group's Supplemental Statement in Support of Motion for Summary Judgment. Request for Distribution of Account and Dismissal of Interpleader (#202), filed on May 31, 2007. Defendants Winnemucca Colony Council and Chairman Linda Ayer (collectively referred to herein as the "Bills Group") filed an Opposition (#207) on September 12, 2007. The Bills Group also filed a Motion for Summary Judgment (#207) on September 12, 2007. The Wasson Group filed an Opposition to the Bills Group's Motion for Summary Judgment (#208)

and a Motion to Strike (#208) on October 1, 2007. The Bills Group filed an Opposition to Motion to Strike (#209) on November 5, 2007, and a Reply (#210) to the Wasson Group's Opposition to Motion for Summary Judgment on November 8, 2007. The Wasson Group filed a Reply (#212) in support of their Supplemental Motion for Summary Judgment on November 19, 2007.

BACKGROUND

On August 28, 2000, Plaintiff Bank of America filed a complaint in interpleader to resolve a dispute between various parties as to who had authority to use a bank account opened in the name of "Winnemucca Indian Colony." The suit arose after two tribal factions, each claiming to be the lawful tribal council for the Winnemucca Indian Colony, claimed to be entitled to the funds.

Prior to the filing of the complaint in interpleader, as of February 21, 2000, the members of the Winnemucca Colony Council were Chair Glenn Wasson, Vice Chair William Bills, and members Thomas Wasson, Elverine Castro, and Lucy Lowery. (Report and Recommendation of U.S. Magistrate Judge (#167)). Chair Glenn Wasson died on February 22, 2000. *Id.* Shortly thereafter, the tribal council split into two factions: (1) Vice Chair William Bills, who claimed to be the acting chair of the tribal council (the Bills Group); and (2) members Thomas Wasson, Elverine Castro, and Lucy Lowery, who claimed to be the majority of

the tribal council (the Wasson Group). *Id.* Each faction maintained that they were the legitimate governing tribal council of the Winnemucca Indian Colony. *Id.*

On April 7, 2000, William Bills filed a Motion for Emergency Injunctive Relief in the Winnemucca Tribal Court. (Bills Group Motion for Summary Judgment (#207) at Exhibit A). This motion sought an order against the other council members ordering them to cease from interfering with the finances of the colony, and to turn over all bank account information and funds. On January 18, 2001, then-current Tribal Court Judge Kyle Swanson issued an order granting William Bill's motion for emergency relief. In that order, Judge Swanson held that William Bills was "duly seated and Acting Tribal Chairman of the Winnemucca Indian Colony," and that William Bills had the authority to "protect and disburse funds in all bank accounts holding funds by and for the Winnemucca Indian Colony." *Id.* The order also held that Thomas Wasson, Elverine Castro and Lucy Lowery "were not lawfully elected and do not officially hold the seats of Tribal Council members." *Id.* The Wasson Group appealed this order to the Inter-Tribal Court of Appeals of Nevada ("Inter-Tribal Court of Appeals") on January 23, 2001. (Bills Group Motion for Summary Judgment (#207) at Exhibit B). The Inter-Tribal Court of Appeals ordered that a trial be held on the matter. Specifically, the court stated that "there exist several issues which have not been ruled upon and which should have been done prior to appeal."

(Opposition to Motion for Summary Judgment (#208) at Exhibit 3). Furthermore, that court noted that "pursuant to stipulation by the parties," a trial would be conducted by someone agreeable to the parties to conduct said trial." *Id.*

Trial was heard before *pro tem* Judge Steven Haberfeld. Following the trial, Judge Haberfeld issued an order finding, among other things, that there was no legitimately formed tribal council and ordered an election to establish the council. Both parties appealed Judge Haberfeld's decision. At the time of that appeal, the Inter-Tribal Court of Appeals, which would have normally heard the case, was not functioning because of lack of funds. As such, the parties stipulated to the appointment of a special appellate panel to hear appellate arguments and to issue a binding, non-appealable decision. (Wasson Group Motion for Summary Judgment (#147) at Exhibit 8). The special appellate panel consisted of a panel of judges from the Sioux Nation (the "Minnesota Panel").

The Minnesota Panel issued its decision on August 16, 2002. In its decision, the Minnesota Panel found that the valid tribal council included the following people: Sharon Wasson, Thomas Wasson, William Bills, Elverine Castro and Thomas Magiera until his death. (Wasson Group Motion for Summary Judgment (#147) at Exhibit 8). As such, the panel stated that "all subsequent activities of the Bills Council are found to be unconstitutional and invalid." *Id.* The panel also ordered that the council "declare a vacancy on the Colony Council because of the death of Thomas

Magiera immediately and within 30 days of this order appoint a successor to fill the unexpired term of Thomas Magiera." *Id.* The Bills Group appealed the decision of the Minnesota Panel after the Inter-Tribal Court of Appeals was refunded.

Despite five more years of litigation, there is still a dispute between the parties as to which members constitute the legitimate tribal council. On May 17, 2007, the Inter-Tribal Court of Appeals issued an order dismissing the case stating that it had no appellate jurisdiction. (Supplemental Statement in Support of Motion for Summary Judgment (#202) at Exhibit 5). As a result, that court stated "we withdraw the mandates of all orders and rulings." *Id.* Both sides now argue that the May 17, 2007 order supports their motion for summary judgment. According to the Wasson Group, they are entitled to summary judgment because they have now exhausted all tribal remedies and this Court has jurisdiction to distribute the funds in accordance with the decision of the Minnesota Panel. The Bills Group, on the other hand, argues that they are entitled to summary judgment following the May 17, 2007 order, because that order rendered all litigation before that court null and void and the parties are left with the order issued by Judge Swanson on January 18, 2001, which held that the Bills Group was the legitimate council.

ANALYSIS

A. Subject Matter Jurisdiction

Under Federal Rule of Civil Procedure 12(b)(1), a case will be dismissed if the court lacks the authority to hear and decide the dispute. Lack of subject matter jurisdiction may be raised at any time by any party. *In re Kieslich*, 258 F.3d 968, 970 (9th Cir. 2001); *Intercontinental Travel Mktg., Inc. V. F.D.I.C.*, 45 F.3d 1278, 1286 (9th Cir. 1994). Additionally, the court may *sua sponte* raise the issue of lack of subject matter jurisdiction and dismiss a case if no subject matter jurisdiction exists. Fed. R. Civ. P. 12(h)(3); *Intercontinental Travel*, 45 F.3d at 1286.

In this case, the determination of subject matter jurisdiction is important because this dispute relates to the issue of tribal self-government. The Supreme Court has "repeatedly recognized the federal government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). "Tribal courts play a vital role in tribal self-government and the federal government has consistently encouraged their development." *LaPlante,* 480 U.S. at 14. In discussing the holding in *National Farmers Union,* the Court in *LaPlante* stated:

> [A]lthough the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court. Promotion of tribal

> self-government and self-determination required that the tribal court have "the first opportunity to evaluate the factual and legal basis for the challenge" to its jurisdiction.

LaPlante, 480 U.S. at 15 (discussing *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)). "In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *LaPlante*, 480 U.S. at 16.

The Ninth Circuit found that it is "deeply rooted" in Supreme Court precedent that federal courts must afford tribal courts deference "concerning activities occurring on reservation land." *U.S. v. Plainbull*, 957 F.2d 724, 727 (9th Cir. 1992) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Deference to tribal courts concerning tribal affairs is a fundamental tenet of federal jurisprudence. *Plainbull*, 957 F.2d at 727. "Tribes maintain broad authority over the conduct of both tribal members and non-members on Indian land." *McDonald v. Means*, 300 F.3d 1037, 1040 (9th Cir. 2002).

In this case, the Court recognizes the importance of tribal courts in promoting and encouraging tribal sovereignty. As such, the Court agrees that "a federal court should stay its hand until tribal remedies are exhausted and the tribal court has had a full opportunity to determine its own jurisdiction." *U.S. ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d

1273, 1276 (8th Cir. 1987) (citing *National Farmer's Union Ins. Co.,* 471 U.S. at 856). In this case, the tribal court has had a full opportunity to determine its own jurisdiction. This matter has been pending for over seven years. On May 17, 2007, the Inter-Tribal Court of Appeals issued an order dismissing the case for lack of jurisdiction. Based on that order, this Court finds that the parties have exhausted all tribal remedies. Because tribal remedies have been exhausted, this Court has jurisdiction to enter summary judgment and distribute the bank account funds held in interpleader.

B. Summary Judgment

Federal Rule of Civil Procedure 56 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is "not warranted if a material issue of fact exists for trial." *Ribitzki v. Canmar Reading & Bates*, 111 F.3d 658, 661-62 (9th Cir. 1997). A material fact is one that "might affect the outcome of the suit under the governing law. . . ." *Lindahl v. Air France*, 930 F.2d 1434, 1436 (9th Cir. 1991) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)). Further, any dispute regarding a material issue of fact must be genuine – the evidence must be such that "a reasonable jury could return a

verdict for the nonmoving party" *Id.* Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial" and summary judgment is proper *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The burden of proving the absence of a genuine issue of material fact lies with the moving party, accordingly, "[t]he evidence of the opposing party is to be believed, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in the light most favorable to the nonmoving party." *Id.* (citing *Liberty Lobby*, 477 US at 225); *Martinez v. City of Los Angeles*, 141 F3d 1371, 1379 (9th Cir. 1998). Nevertheless, if the moving party presents evidence that would call for judgment as a matter of law, then the opposing party must show by specific facts the existence of a genuine issue for trial. *Liberty Lobby*, 377 U.S. at 250; Fed. R. Civ. P. 56(e). To demonstrate a genuine issue of material fact, the nonmoving party "must do more than simply show there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus.*, 475 U.S. at 586. "If the evidence [proffered by the nonmoving party] is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50.

When the parties file cross-motions for summary judgment, as in this case, the court must consider each party's motion separately and determine whether that party is entitled to a judgment under Rule 56.

Western Land Exchange Project v. U.S. Bureau of Land Mgmt., 315 F.Supp.2d 1068, 1075 (D. Nev 2004). Cross-motions for summary judgment do not necessarily mean that there are no disputed issues of material fact, and do not necessarily permit the judge to render judgment in favor of one side or the other. *Starsky v. Williams*, 572 F.2d 109, 112 (9th Cir. 1975). In making these determinations, the court must evaluate the evidence offered in support of each cross-motion. *Id.* (citing *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136-37 (9th Cir. 2001)). Applying these principles, the Court now turns to whether summary judgment is warranted in this case.

Both parties believe that no triable issues of fact exist and judgment should be entered in their favor. As noted in the foregoing, the Wasson Group argues that they are entitled to summary judgment and a distribution of the bank account funds according to the decision of the Minnesota Panel. The Bills Group, on the other hand, argues that they are entitled to summary judgment under Judge Swanson's order of January 18, 2001.

"Tribal sovereignty undoubtedly includes the power to establish a court system." *Davis v. Muellar*, 643 F.2d 521, 525 (8th Cir. 1981). "The tribes derive their adjudicatory power not from Article III, but from their inherent sovereignty as the aboriginal people of this continent, from the vestiges of their once absolute authority over their internal affairs." *State of Montana v. Gilham*, 133 F.3d 1133, 1136 (9th

Cir. 1998). As such, "an Indian tribe has the power, absent some treaty provision or act of congress to the contrary, to enact its own laws for the government of its people, and to establish courts to enforce them." *Colliflower v. Garland*, 342 F.2d 369, 376 (9th Cir. 1965).

"As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity." *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002). Two circumstances preclude recognition "when the tribal court either lacked jurisdiction or denied the losing party due process of law." *Id.* "Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court." *Id.* In this case, the parties are asking the Court to enforce two separate judgments arising from the tribal court adjudication. The first is the January 18, 2001 order issued by Judge Swanson recognizing the Bills Group as the legitimate tribal council. The second is the August 16, 2002 decision by the Minnesota Panel which listed the following individuals as the legitimate council: Sharon Wasson, Thomas Wasson, Williams Bills, Elverine Castro and Thomas Magiera until his death.

The Bills Group argues that this Court must enforce the January 18, 2001 order issued by Judge Swanson because the Inter-Tribal Court of Appeals stated in its May 17, 2007 order that "we withdraw the mandates of all orders and rulings." (Bills Group

Motion for Summary Judgment (#207) at p. 4). Thus, all previous orders arising from the Inter-Tribal Court of Appeals are withdrawn. *Id.* The Bills Group argues that this includes the decision by the Minnesota Panel because that decision arose from an appeal of Judge Haberfeld's decision, and, Judge Haberfeld's decision, in turn, was issued after the Inter-Tribal Court of Appeals remanded Judge Swanson's order for trial. As such, according to the Bills Group, because the Inter-Tribal Court of Appeals directed a trial on Judge Swanson's order, and such trial resulted in Judge Haberfeld's order, that branch of litigation is null and void under the Inter-Tribal Court of Appeal's May 17, 2007 order. *Id.* Thus, the Bills Group argues that the decision of the Minnesota Panel is "without any legal force and effect." *Id.* at p. 15. The Wasson Group argues that the Court must enforce the Minnesota Panel's order because that decision was rendered by an independent panel created by stipulation of the parties. As such, that panel's decision is not affected by the Inter-Tribal Court of Appeals' order dismissing the case for lack of jurisdiction.

This Court finds that the decision by the Minnesota Panel is controlling in this matter. As noted, the Bills Group argues that the decision of the Minnesota Panel is without force or effect following the Inter-Tribal Court of Appeals' order dismissing the case for lack of jurisdiction. Although the Minnesota Panel was convened following an appeal to the Inter-Tribal Court of Appeals from Judge Swanson's order, the

Inter-Tribal Court of Appeals' May 17, 2007 order does not withdraw the decision by that panel. The Minnesota Panel was a specially appointed appellate panel created by stipulation of the parties. The panel was convened specifically to hear appellate arguments and to issue a binding, non-appealable decision. (Wasson Group Motion for Summary Judgment (#147) at Exhibit 8). Moreover, the panel was created at a time when the Inter-Tribal Court of Appeals did not even exist because of lack of funding. As such, the Inter-Tribal Court of Appeals lack of jurisdiction over this case does not affect the jurisdiction of the Minnesota Panel.

In addition, the fact that the Minnesota Panel's decision arose from a trial that had been directed by the Inter-Tribal Court of Appeals does not divest that decision of its legal force and effect. A review of the Inter-Tribal Court of Appeals' order remanding the case for trial shows that the court did not make any substantive decision on the merits of the case. Rather, it simply stated that "several issues have not been ruled upon and which should have been done prior to appeal." That court's order then states that "pursuant to stipulation of the parties" the parties will conduct a trial on such issues. The parties then agreed to have *pro tem* Judge Haberfeld hear their case at the trial level. The parties further stipulated to create a special panel to hear appeals from Judge Haberfeld's decision. As such, those two tribunals were created by stipulation of the parties and are not affected by the Inter-Tribal Court of Appeals' lack of jurisdiction.

Based on the foregoing, this Court finds that the decision by the Minnesota Panel is in full force and effect following the Inter-Tribal Court of Appeals' dismissal for lack of jurisdiction. Under principles of comity, that decision is entitled to enforcement in this Court. As such, the funds of the Bank of America account which have been held in interpleader in this matter will be distributed to the tribal council recognized by the Minnesota Panel's August 16, 2002 order.

CONCLUSION

Based on the foregoing. IT IS ORDERED that the Wasson Group's Motion for Summary Judgment (#147), Supplemental Statement in Support of Motion for Summary Judgment, Request for Distribution of Account and Dismissal of Interpleader (#202) is GRANTED.

IT IS FURTHER ORDERED that the Bills Group Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that all other pending motions are DENIED.

DATED: This 6th day of March, 2008.

/s/ B Sandoval
BRIAN SANDOVAL
United States District Judge

INTER-TRIBAL COURT OF APPEALS OF NEVADA

SHARON WASSON, et al., **APPELLANT,** **v.** **WILLIAM BILLS,** **APPELLEE.**	**Case No. ITCN AC AP 1.01** **PER CURIAM** (Filed May 17, 2007)

BEFORE: Associate Justice Gary Bass, Associate Justice Cheryl Fairbanks, Associate Justice Eric P. Swenson.

This matter is before this Court on its own motion to revisit the granting of jurisdiction. It is apparent that jurisdiction was improvidently assumed. Accordingly, we withdraw the mandates of all orders and rulings. We recognize that this ruling leaves the issues raised in this and other proceedings uncertain in terms of finality and effect. Nevertheless, this Court may proceed no further once it is determined there is no appellate jurisdiction.[1]

It is SO ORDERED, this 7th day of May, 2007.

---

[1] We also note the failure to comply with this Court's order of September 8, 2006 provides additional ground to dismiss this appeal and strike all pleadings from the record.

INTERTRIBAL COURT OF APPEALS OF NEVADA

IN AND FOR THE WINNEMUCCA TRIBAL COURT

WASHOE COUNTY, SPARKS, NEVADA

SHARRON WASSON, LUCY (WASSON) LOWERY, ELVERINE CASTRO AND THOMAS WASSON, BUSINESS COUNCIL OF THE WINNEMUCCA INDIAN COLONY,	**Case No. ITCN / AC AP 1.01**
V.	
WILLIAM BILLS, an individual.	

Shannon R. Rambeau, hereby deposes and says: That she is a citizen of the United States of America, over the age of 21, not a party to, nor interested in, the above entitled matter, and that she mailed by first-class postage, delivered in person, or sent by facsimile transmission (as noted), a file-stamped copy of the attached document(s) entitled:

AFFIDAVIT OF SERVICE

to the following individual(s):

Donald K. Pope, Esq. ~~1385 Haskell St.~~ [1188 Calif. Ave.] Reno, NV 89509	Treva Hearne, Esq. Hearne & Hager 910 East Parr Blvd. Suite 8 Reno, NV 89512	Sarah Lawson, Esq. Rosette & Associates 6124 East Brown Road Suite 101 Mesa, AZ 85205

/s/ Shannon Rambeau
Shannon R. Rambeau,
Court Coordinator

Dated: May 17, 2007

IN THE INTER-TRIBAL COURT OF APPEALS OF NEVADA

SHARON WASSON, LUCY (WASSON) LOWREY, ELVERINE CASTRO AND THOMAS WASSON; BUSINESS COUNCIL OF THE WINNEMUCCA INDIAN COLONY, Appellants, vs. WILLIAM BILLS, an individual, Appellee. IN RE: KYLE SWANSON Defendants.	**DECISION AND ORDER** CASE NO. ITCN/AP 1.01

APPEAL FROM THE WINNEMUCCA TRIBAL COURT, IN AND FOR THE WINNEMUCCA INDIAN COLONY, WINNEMUCCA, NEVADA

(Filed Sep. 16, 2004)

CASE NO. CV 1003

HEARD BEFORE:

WILLIAM KOCKENMEISTER, ACTING CHIEF JUSTICE PATRICIA STEARNS, ASSOCIATE JUSTICE T. LAURA LUI, ASSOCIATE JUSTICE

APPELLANTS COUNSEL:
TREVA HEARNE, ESQ.

APPELLEES COUNSEL:
DONALD K. POPE, ESQ.

OPINION: T. LAURA LUI

DECISION ON APPEAL

I. INTRODUCTION

THIS MATTER has a protracted and complex history that has worked its way through numerous courts over the period of four years. Finally, this matter comes before this Court as a result of a motion by the Appellee, William Bills ("BILLS GROUP") that this Court should reconsider the decision of the Specially Appointed Minnesota Panel in an effort to resolve the leadership disputes within the Winnemucca Indian Colony ("WIC"). Initially, the Court asked the parties to address the issue of its jurisdiction to reconsider the decision of the Specially Appointed Minnesota Panel. A hearing on the limited question of jurisdiction was held on January 22, 2004. After reviewing the briefs and arguments of the parties, this Court issued an Order on March 19, 2004, stating that it had jurisdiction to reconsider the Order of the Specially Appointed Minnesota Panel and decide the matter on the merits. A hearing before this Court was held on July 7, 2004.

After reviewing the voluminous record below as well as the arguments presented by counsel on July 7,

2004, the Court intends on ending the controversy that has enveloped the WIC may finally come to an end. In reaching its decision the Court finds that currently there is no WIC Council beyond the Colony Council in place in 2000 that was legitimately formed and that can purport to be representative of a cross section of interests in the WIC. A new Colony Council election must be held in order to end the crisis that has disrupted the lives of the WIC members for the past four years and to restore the WIC government so that its members can once again participate in the government that makes decisions that directly affect them.

I. ISSUES

1. The names and members of the Winnemucca Indian Colony who are eligible for enrollment.

2. The identity of the proper and legitimate members of the business council of the Winnemucca Indian Colony at the present time.

II. BACKGROUND

The Winnemucca Indian Colony ("WIC") was created by the federal government on June 18, 1917, by Executive Order (No. 2639). The federal government set aside 340 acres near the town of Winnemucca, Nevada, for "homeless Indians" living in the area; however, only 20 acres of the land of the WIC was utilized. The remaining 320 acres remained

unused for many years. Subsequent to the establishment of the WIC, on June 11, 1935, the Indians living there voted to organize under the Indian Reorganization Act ("IRA") Of June 18, 1934 (48 Stat. 984). They formed a representative form of government, the powers and responsibilities of which are described in a written Constitution & by-laws which was later approved by the Assistant Secretary of the Interior on March 5, 1971.

The WIC Constitution incorporated certain fundamental democratic principles required of tribes that chose to organize under the IRA. Article VII of the WIC Constitution provides that the ultimate decision-making power and authority rests with the general members, acting collectively in General Council. The members of the Colony, or General Council, then delegate specific responsibilities to an elected Tribal or Colony Council. Article VI enumerates those responsibilities and also delegates the day-to-day affairs of the tribal government to the Colony Council. Article III, Section 1 provides for five elected Colony Council members. These members serve two-year terms pursuant to Article III, Section 3. Article IV, Section 2 provides that colony council elections are held in October every even numbered year. The Colony Council members are accountable to the members of the WIC for their behavior and may be removed for cause provided due process procedures are followed as provided for in Article V, Section 2. Article IV provided that no business of the WIC is to be transacted unless a quorum of three (3) council

members was present. According to Article VIII of the WIC Constitution, the rights of the minority are protected and individuals retain all rights guaranteed by the United States Constitution and the WIC Constitution.

Although its Constitution provides for a government, the WIC's government has been in a major crisis since February, 2000. The Bureau of Indian Affairs ("BIA") has deemed it "dysfunctional" and no longer maintained a "government to government" relationship with the Colony. As a result, the WIC cannot obtain grants from or enter into contracts with federal government agencies that provide funds, programs, and services tribal governments typically depend on to meet the basic needs of it members.

At the heart of the crisis is a lack of agreement among WIC members about two fundamental questions. The first question revolves around the question of who constitutes the legitimate Colony Council. At this time, there are two factions that purport to be the legitimately elected representatives of the WIC membership, each pointing to elections they organized in the community that brought them to power.

In the early summer of 2000, after being unable to resolve conflicts over leadership and membership with the WIC's government's legislative branch, one of the factions took the matter to the WIC Tribal Court for resolution. The Tribal Court Judge, Kyle Swanson, issued a ruling. Appellants appealed the decision by Judge Swanson to the Inter-tribal Court

of Appeals. On June 29, 2001, the Appeals Court remanded the matter back to Tribal Court, obtaining agreement from both parties that they would jointly appoint a mutually acceptable ***pro tem*** Tribal Court Judge who would have authority to decide three very fundamental questions regarding the future of the WIC and its government. The three fundamental questions to be resolved by the Tribal Court were: (1) Who is eligible to be a member of the WIC? (2) What is the legitimate Tribal Council at that time? (3) Who is legally authorized to hold the office of Tribal Judge at that time?[1] The parties agreed that Steven Haberfield would act as Tribal Judge pro tem and decide these fundamental issues. On May 9, 2002, Judge Haberfield issued his decision.

Appellants appealed Judge Haberfield's decision to the Inter-tribal Court of Appeals; however, at that time the Inter-Tribal Court of Appeals of Nevada was dismantled. No appellate court was in existence in Nevada to hear Appellants appeal. In an effort to end the turmoil in the WIC, the parties agreed to a specially appointed appellate panel to hear appellate arguments and to issue a decision. An appellate panel of judges was selected from outside of Nevada. A hearing was conducted and a decision rendered. After the Inter-tribal Court of Appeals was formed once again, Appellee filed a motion requesting that this

---

[1] The first two questions are the exact same questions that come before this Appeals Court more than three years later.

Court reconsider the decision of the Specially Appointed Minnesota Panel. After this Court found that it had jurisdiction to reconsider the Order by the Specially Appointed Minnesota Panel, the Court heard this matter on July 7, 2004. This matter now stands ready for decision.

A. LEGITIMATE TRIBAL COUNCIL

The initial issue to be resolved is who is the legitimate WIC Tribal Council at the present time. In order to resolve this issue, the Court must look to the last time that a legitimate Tribal Council existed at the WIC. Prior to February 22, 2000, there was a legitimate Tribal Council operating at the WIC. As of February 21, 2000, Glen Wasson was serving as Chairman, William Bills as Vice-Chairman and Thomas Wasson was serving as the Secretary/ treasurer. Elverine (Wasson) Castro and Lucy Lowry were serving as members-at-large.

On February 22, 2000, Glen Wasson was stabbed on the steps of the Administration Building at the WIC. Upon his death, William Bills, the bona-fide Tribal Vice-Chairman, assumed leadership responsibilities as the Acting Chairperson in accordance with the WIC Constitution and Bylaws; however, soon afterwards, the remaining members of the Tribal Council in existence on February 21, 2000, divided into two separate and distinct factions. Both factions purport to be the legitimately elected representatives of the WIC membership.

Since February, 2000, it appears that there have been several colony council elections held by both factions. Based on the record below, none of these elections subsequent to February, 2000, were legal or valid[2]. On April 9, 1994, a legitimately-elected Colony Council passed Ordinance 301 governing all elections of the WIC. Ordinance 301 provides specific procedures to be followed during elections. Based on the record below, several irregularities existed which rendered each subsequent election to February, 2000, illegal and void for failure to follow the Tribal Election Ordinance and democratic principles embodied in the WIC Constitution. These irregularities are:(1) participation in elections was restricted. Certain applicants for enrollment were denied consideration and were denied a forum in which they could appeal their exclusion; (2) lack of proper notice regarding WIC elections as provided in Section 2(c) of the Election Ordinance; (3) insufficient insulation of the election process from manipulation by the candidates; (4) lack of sharing the list of candidates with the Council's own member list as provided in Section 2(c) of the Election Ordinance; (5) absence of safeguards regarding absentee ballots to ensure that the person only voted once; (6) lack of notification and advise to tribal members about the appeal process when they

---

[2] Article IV, section 2 and Article VI, section g of the WIC Constitution authorized the Colony Council to enact Ordinance 301.

disagreed with aspects of the election process or results; and(7) the process by which William Bills and Elverine Castro were removed and replaced by other council members was arbitrary and undemocratic according to the WIC Constitution. The most damaging fact in the record is the lack of cooperation and collaboration by either faction in developing a list of eligible tribal members, effectively forestalling any proper tribal election and still leaving a task that must be completed before a proper WIC tribal election can be held. In effect, this decision reinstates the last legitimately elected Colony Council, namely the Colony Council in place in February, 2000.

B. WIC MEMBERSHIP

The second issue, related to the first, revolves around who is a WIC member and therefore entitled to choose a government for the WIC. Although the immediate question raised by the parties in this appeal concerns tribal leadership, the Court finds the question of tribal leadership cannot be resolved without first addressing the more fundamental question of tribal membership. Without knowing who is a tribal member, the Court cannot determine whether or not only tribal members voted in any election subsequent to February, 2000, and, more importantly, whether only tribal members were elected to office.

This second question regarding WIC membership has never been definitively resolved since the WIC's

inception. While originally reserved for homeless Indians, membership was made more restrictive when the WIC Constitution was adopted in 1935. Members had either to appear or be descended from people who appeared on the 1916 census roll. To this day, many of the people living on the Indian colony are precluded from participating in the government that makes decisions directly affecting them. There is still another source of difficulty in regards to who is a member. The United States government, in creating the WIC, attempted to combine people from two distinct, tribes into one community. As members attempt to work out their everyday political control issues, the separation between the Shoshone and Paiute people has never been completely overcome and has contributed to bringing the WIC community into its current crises.

Since there must be a new tribal election at the WIC, there also must be provided the fullest opportunity to all eligible tribal members to participate in choosing their elected representatives. In other words, before there can be an election there must be an official tribal enrollment list in existence to determine who is eligible to vote. According to the WIC Election Ordinance #301 "any enrolled members of WIC who has attained the age of twenty-one (21) years shall have the right to vote, provided his/her name is on the Eligible Voters List." Given that today there is no agreed upon WIC Eligible Enrollment List, who has the authority to create such an Enrollment List? Normally the answer is quite

straightforward. Article II, Section 3 of the Winnemucca Constitution states "that the Winnemucca Colony Council shall have the power to enact ordinances governing the procedures to be followed when a member becomes ineligible for continued membership, when a person wishes to be adopted into membership, and when an eligible member requests to be officially enrolled." The WIC Enrollment Ordinance #310 spells cut application, review, approval and appeal procedures. Under normal conditions, according to the Winnemucca Constitution, it is the WIC Colony Council, and its Enrollment Committee, that has the authority to conduct tribal elections to ensure an orderly transfer of power to a new leadership every two years. Under normal conditions, the Tribal Court is also a forum in which membership can be determined. Enrollment Ordinance #310 provides that a dissatisfied applicant for membership in the WIC can appeal "to the appropriate Tribal Court within ten (10) days, and through any appellate courts as appropriate within the judicial rights provided by those courts." In this case that question is anything but straightforward and the conditions are not normal. The simple fact is that there is no established enrollment list at the WIC, and there is no legitimate Colony Council and Tribal Court to resolve this issue.

In the absence of an established enrollment list and a legitimate Colony Council, this Court finds itself in the position of facilitating the construction of an enrollment list and the conduct of an impartial

and fair colony council election. This Court's authority to facilitate the construction of an enrollment list derives from the Winnemucca Constitution and the WIC Enrollment Ordinance #310 which provides that any appellate court can decide the issue of tribal membership. Additional authority is derived from the agreement between parties to have the Court decide the fundamental issues presented throughout this appeal, from the initial appeal taken by the Appellants to the Motion for Reconsideration taken by the Appellees. The fundamental questions presented in 2000 are the same questions presented four years later. Consequently, the Court finds that if it does not facilitate creation of an enrollment list, enrollment will not be settled and there will be no WIC election held that is widely recognized as legitimate. Thus, in keeping with the democratic principles embodies in the Winnemucca Constitution and Enrollment Ordinances, the Court orders the Colony Council in existence in February, 2000, to submit an enrollment list to the Court within 30 days of this Order. The Court recognizes that the Colony Council in February, 2000, is now divided into the two parties that appear on this appeal. The practical effect will be that each party to this appeal will present an enrollment list the Court. The Court will examine the list provided by each party and determine which members on the enrollment list are agreed upon and which are contested. Within 30 days after the lists have been provided, the Court will hold a hearing on the contested names on the enrollment lists. After the

hearing, the Court will create an Enrollment List of eligible WIC members who meet the WIC Constitution's eligibility criteria. After the Enrollment List is created, pursuant to the WIC Constitution, all eligible members will be allowed to vote in a legitimate tribal election.

The Court is aware that this decision will continue the WIC's leadership controversy, at least temporarily. The controversy will end soon and will result in electing individuals that will be representative of a cross section of the members of the WIC.

DATED this 17th day of September, 2004.

/s/ William Kockenmeister
WILLIAM
KOCKENMEISTER
Acting Chief Justice

/s/ Patricia Stearns
PATRICIA STEARNS
Associate Justice

/s/ T. Laura Lui
T. LAURA LUI
Associate Justice

AFFIDAVIT OF SERVICE

State of Nevada)

) ss.

County of Washoe)

SHANNON RAMBEAU hereby deposes and says: that she is a citizen of the United States of America over the age of 21, not a party to, nor interested in, the above-entitled matter and that she mailed by first-class postage, deliver in person, or sent by facsimile transmission(as noted) a filed stamped copy of the attached document(s) entitled.

FINAL OPINION/DECISION

Sharon Wasson, et al

v.

William Bills, an individual

AP. 1.01

to the following:

Treva Hearne, Esq.
910 East Parr Blvd. Suite 8
Reno, NV 89512

Donald Pope, Esq.
1385 Haskell St.
Reno, NV 89512 [09]

Date: September 20, 2004 /s/ Shannon Rambeau
Shannon Rambeau,
Court Coordinator

In the Inter-Tribal Court of Appeals of Nevada

SHARON WASSON, LUCY (WASSON) LOWERY, ELVERINE CASTRO AND THOMAS WASSON; BUSINESS COUNCIL OF THE WINNEMUCCA INDIAN COLONY, Appellants, vs. WILLIAM BILLS, an individual, Appellee In re: Kyle Swanson	DECISION AND ORDER Case No. ITCN/AC AP 1.01 (Filed Mar. 19, 2004)

Appeal from the Winnemucca Indian Colony Court, in and for the Winnemucca Indian Colony; Honorable Kyle A. Swanson presiding.

Before: Bill Kockenmeister, Acting Chief Justice
T. Laura Lui, Associate Justice
Patricia H. Stearns, Associate Justice

Appearances: Treva J. Hearne, with and for the Appellants
Donald K. Pope, with and for the Appellees

Opinion by: Associate Justice Patricia H. Stearns

The appeal before this court stems from lengthy litigation by the parties in several courts to determine which of the two groups claiming to be the

legitimate Tribal Council of the Winnemucca Indian Colony is the rightful tribal council. Oral arguments were heard before the Court regarding the sole issue of jurisdiction of this Court to hear the case on its merits on January 21, 2004 before Acting Chief Justice Rill Kockenmeister, Associate Justice T. Laura Liu and Associate Justice Patricia H. Stearns.

I. BACKGROUND

Appellants, hereinafter the "Wasson Group" and Appellees, hereinafter the "Bills Group" have litigated the fundamental issue of which group is to be recognized as the proper Tribal Council in several courts for over four years.

After Chairman Glenn Wasson was killed in 2000, the Winnemucca Indian Colony Tribal Council over a period of time broke into two groups, each claiming to be the rightful tribal council. One group consisted of Vice Chair William Bills and the other Thomas Wasson, Elverine Castro, and Lucy Lowery, the remaining members of the tribal council. Each faction argued that they should have access to funds in the approximate amount of $360,000.00 held on behalf of the Tribe by the Bank of America. William Bills, the vice-Chairman who had succeeded Glenn Wasson, filed an action against the remaining members of the Council to prevent them from having access to the funds. This action was heard by tribal judge Kyle Swanson. Judge Swanson held that the council consisted of William Bills as acting Chairman,

Thomas Wasson and Elverine Castro. Both factions have taken action on behalf of the colony.

On August 28, 2000, Bank of America filed an interpleader action in the 9th Circuit District Court asking for instructions as to which group was the official Tribal Council which should have access to the funds. Bank of America was dismissed from the case on June 7, 2001, after depositing the funds in question with the Court.

Two other positions on the Tribal Council remained to be filled because of the deaths of Glen Wasson and Lucy Lowery. At this time, the Council split into two factions: (1) the Bills Group with William Bills and (2) the Wasson Group, consisting of the remaining members of the Council and the new members who had been added. Both groups claimed to be the true Council with rights to govern under the Winnemucca Law and Order Code ("WLOC").

By resolutions numbers 5-2000-3 and 5-2000-002, the Wasson Group removed Judge Swanson and hired Chuck Hartman as their appointed judge in May of 2000. They continued to hold hearings in front of Judge Hartman. In addition, the Wasson Group appealed Judge Swanson's Order to the Inter-Tribal Court of Appeals of Nevada ("ITCAN") which was then administered through Sparks/Reno. A motion was brought by the Bills Group to dismiss the appeal for lack of jurisdiction.

The ITCAN heard oral arguments on the appeal on June 11, 2001. The Court held that the case was

not ripe for appeal as there was no record from the lower court and remanded the case to a *pro tem* tribal judge to have several issues determined which it deemed should have been resolved prior to the appeal. By stipulation, both parties agreed to a tribal judge to determine the names of the members of the Winnemucca Indian Colony eligible for enrollment, the identity of the proper and legitimate members of the Colony and the identity of a tribal judge, not a *pro tem,* authorized to hold office for the Colony at that time. No determination was made as to whether or not the ITCAN had jurisdiction over the case.

Judge Steve Haberfeld was selected as the judge to hear the case. He held hearings for several days in 2001 and 2002. He held that neither group was the legitimate council and that a new tribal council election should be held in October of 2002. Both sides appealed this decision, but by that time the ITCAN had disbanded and no court was available.

After many negotiations. with the help of the 9th Circuit mediation program, the parties agreed to hire a three judge panel of Minnesota Sioux judges to hear the case. Oral arguments were heard by the panel on July 24, 2002. The Court reversed Judge Haberfeld's decision and found that the Winnemucca Indian Colony Tribal Council consisted of Sharon Wasson, Thomas Wasson, William Bills, Elverine Castro and the one vacancy left by replacement Thomas Mageira's death. The Bills Group petitioned for a rehearing but received no response from the panel.

In March, 2003, after receiving the recommendation of the U.S. Magistrate Judge Valerie Cooke to dismiss all claims and cross-claims for lack of subject matter jurisdiction, the District Court stayed proceedings in the Bank of America case to allow the parties to return to the ITCAN to hear the issues of jurisdiction or to determine the claims and cross-claims on the merits.

II. ANALYSIS.

The primary issue to be determined by this Court before any further proceedings can occur is whether or not this court has jurisdiction over this case. The Wasson Group argues that the decision of the three judge panel of Minnesota judges is final and should stand, leaving the Wasson Group as the authorized Indian Council and this Court therefore has no jurisdiction. The Bills Group argues that the Minnesota judges had no jurisdiction to hear the case as it was not a proper appellate panel according the Winnemucca Colony Law and Order Code and not all members of the Council approved the appointment of the judges. This Court, without having heard the merits of the case, disagrees with both positions.

A. The Minnesota Judges.

The Minnesota Judges had jurisdiction to hear the case and make a determination on the merits as an appellate court. Both parties agreed to the appointment of the panel and participated in the

hearing. Only when the decision went against them did the Bills decide that they had no jurisdiction. They hung their hat on the Winnemucca Colony Law and Order Code Sections 1-40-020 *et seq.* to support their contention that the court was not proper as not all members of the Tribal Council had approved the appointment.

The fact is that there was no legitimate Tribal Council at that time. The absolute failure of the Colony to follow Judge Haberfeld's Orders has left both parties without the powers of the Tribal Council and has left the Colony in disarrray. The LOC simply does not apply to this situation. Mr. Pope was hired by a group claiming to be the proper Tribal Council, not by a Tribal Council. The Bills Group has standing as a group of individuals, not as a group with any governing power. Mr. Pope was, therefore, entitled to enter into an agreement for his party and that agreement is binding under a theory of *respondeat superior*; the group is bound by the actions of its agent. No other appellate court existed in 2002 which could have properly heard this case. The ITCAN was temporarily disbanded. Agreement to another panel to determine this case in the absence of a recognized forum was a sensible alternative.

By agreeing to be heard by the three-judge panel, both parties agreed to jurisdiction of the panel. One party should not now be able to declare lack of jurisdiction since the decision did not affirm its position.

B. Finality.

The Minnesota panel of judges was an appellate panel authorized by the parties to hear the case on its merits, but its decision is not final. Nothing in the agreement between the parties suggests that they agreed that any decision made by the appointed panel was to be final. Because finality was specifically discussed by the parties, the failure to include finality as part of the ultimate agreement can only be seen as intentional and underscores that it was not a term to which the parties had agreed. The opinion of the three judges is, therefore, appropriately the subject of any appeal or re-hearing request which the parties wish to bring.

As the Inter-Tribal Court of Appeals has now reconvened, it is the appropriate forum to review any decision made by the Minnesota Judges, its surrogate court. Since the Minnesota panel failed to respond to the Petition for Re-Hearing filed by the Bills Group, this Court has determined that, as the Minnesota Panel's successor court, we have the authority to review any decision handed down by this court or its substitute. We can, therefore, grant the Petition for Rehearing

C. Subject Matter Jurisdiction.

This dispute is, by agreement of all the parties, an intra-tribal dispute over the distribution of funds to the rightful Tribal Council of the Winnemucca Indian Colony. The primary reason for the existence

of this Court is to review the adjudication of lower courts on just such issues.

The Wasson Group suggests that because no Tribal Council for the Winnemucca Indian Colony has opted in to the Inter-Tribal Court of Appeals for Nevada, the ITCAN has no jurisdiction. The difficulty with this argument is that it essentially leaves the Colony with nowhere to go to overcome what has seemed like an insurmountable hurdle of deciding the appropriate parties to govern it. Under normal circumstances, this Court would agree that no subject matter jurisdiction may exist absent a resolution to be included in the ITCAN, however, under these very unusual circumstances, there must be an avenue of review for the tribal court rulings on intra-tribal disputes. There is no tribal council to opt in or opt out of any appellate process.

The impasse at which the parties find themselves will continue unless an appropriate forum is found to review the lower court ruling. For this reason, in response to the principles and goals for which this Court was created, we hold that subject matter jurisdiction exists in the Inter-Tribal Court of Appeals of Nevada. This position is reinforced by the need to have supervision of intra-tribal disputes when the Colony itself does not abide by its own Law and Order Code. All of the provisions regarding appointments of judges and appellate courts found in the LOC were entirely or disregarded.

The various times and deadlines for filing appeals, hearing cases and complying with orders have long since passed. Time has not been of the essence. It is time to reach a final resolution of the issues so that the Colony can move on with its business, recognize an appropriate tribal council and obtain the services it needs, if it chooses, from the Bureau of Indian Affairs. The simplest and most direct way to reach this goal is for this Court to assume the jurisdiction and re-hear the case on its merits. While it is true that the parties can continue litigating endlessly, wasting precious court-time and economic resources, it is our hope that the parties will prepare their cases in full one more time for review of the Minnesota Judges opinion and have faith that the issues will be fully considered in reaching a decision with which all will be willing to live.

III. ORDER.

This Court holds that The Inter-Tribal Court of Appeals of Nevada has jurisdiction to review the opinion of the Minnesota Judges, regarding which group, the Bills Group or the Wasson Group, should be considered the rightful tribal council of the Winnemucca Indian Colony, on appeal from Judge Swenson's Opinion. A hearing shall be set on May 28, 2004 with the following briefing schedule:

a. Appellant's initial brief shall be due on or before April 15, 2004;

b. Appellee's initial brief shall be due on or before April 30, 2004;

c. Any and all reply briefs shall be due on or before May 15, 2004.

Dated this 19th day of March, 2004.

/s/ Bill Kockenmeister
BILL KOCKENMEISTER
Acting Chief Justice

/s/ Patricia H. Stearns
PATRICIA h. STEARNS
Associate Justice

AFFIDAVIT OF SERVICE

State of Nevada)
) ss.
County of Washoe)

SHANNON RAMBEAU hereby deposes and says, that she is a citizen of the United States of America, over the age of 21, not a party to, nor interested in, the above-entitled matter, and that she mailed by first-class postage, deliver in person, or sent by facsimile transmission (as noted) a filed-stamped copy of the attached document(s) entitled:

DECISION AND ORDER

to the following:

Treva J. Hearne, Esq.
557 Washington,
Lower Level
Reno, NV 89503

Donald Pope, Esq.
1385 Haskell
Reno, NV 89509

/s/ Shannon Rambeau
SHANNON RAMBEAU

SUBSCRIBED AND SWORN before me this _____ day of _____, 2004.

_____
Notary Public for Nevada
Residing at
Commission Expires

IN THE APPEALS COURT OF THE WINNEMUCCA INDIAN COLONY IN NEVADA
Case No. CV1003 (Lower Court)

Sharon Wasson, Lucy (Wasson) Lowery, et al.,
Appellants,

Vs.

William Bills, Acting Tribal Chairman, et al.
Appellees,

Filed August 16, 2002
Reversed.

Treva J. Hearne, Esq., Zeh, Saint-Aubin, Spoo & Hearne, 575 Forest Street, Suite, 200, Reno, Nevada 89509; and

Donald K. Pope, Esq., 1385 Haskell St., Reno, Nevada 89509.

Considered and decided by Scheffler, Chief Judge, Reding, Associate Judge, and Treuer, Associate Judge.

SYLLABUS

1. The Trial Court's determination of members of the Winnemucca Colony Council is not supported by substantial evidence and does not comport with the Constitution and By-laws of the Winnemucca Indian Colony in Nevada.

2. The Trial Court's determination of the membership of the Winnemucca Indian Colony is

not supported by substantial evidence and does not comport with the Constitution and Bylaws of the Winnemucca Indian Colony.

3. The Trial Court's determination of Tribal Judge is not supported by substantial evidence and does not comport with the Constitution and Bylaws of the Winnemucca Indian Colony.

4. The Order of Steven Haberfeld, issued on May 9, 2002 is reversed and vacated.

OPINION

Introduction

The Winnemucca Indian Colony (WIC) was created by the federal government of the United States by Executive Order No. 2639 dated June 18, 1917 which set aside 340 acres near the town of Winnemucca, Nevada for the benefit of certain "homeless Indians" in the area. The Indians of the Winnemucca Indian Colony organized under the Indian Reorganization Act of June 18, 1934 (as amended). In December 1970 the Winnemucca Indian Colony adopted a Constitution and Bylaws which were approved by the Assistant Secretary of the Interior on March 5, 1971.

Under the Constitution and Bylaws, the WIC had an operating tribal council and engaged in government-to-government relations with the United States government. As of February 21, 2000, the members of the Winnemucca Colony Council were Chairman Glenn Wasson, Vice Chairman Williams Bills, and

members at large Thomas Wasson, Elverine Castro, and Lucy Lowery.

On February 22, 2000, Council Chairman Glenn Wasson was murdered. The events leading to this lawsuit followed the death of Chairman Wasson. The remaining Colony Council split into two factions, both purporting to be the legitimate Colony Council. Each faction took various actions "on behalf of" the Colony. Each faction later held an election and claimed to seat a new council. The governmental chaos in the Colony caused the federal government to declare the Colony to be dysfunctional and to break off government to government relations with it.

Eventually, various lawsuits were filed and the two sides became engaged in litigation to resolve the issues. After a complicated procedural history which is shown in the list of pleadings in this matter, the trial in this matter was heard before *pro tem* Judge Steven Haberfeld. As stated in his Order dated May 9, 2002, the issues to be resolved by the trial judge were:

1) The names of the members of the Winnemucca Indian Colony who are eligible for enrollment.

2) The identity of the proper and legitimate members of the Business Council of the Winnemucca Indian Colony at the present time.

3) The identity of the Tribal Judge, other than the *pro tem* Judge, legally authorized to hold such office for the Colony at the present time.

Judge Haberfeld's Order dated May 9, 2002, as amended by Order dated May 22, 2002, determined the identity of the legitimate tribal judge, created a membership list for the WIC, and determined that there was no legitimately formed tribal counsel and ordered an election to establish the council. Although the trial court judge recognized that an "Indian tribe's most basic power is the authority to determine its own membership," he determined that in this instance, he was given specific instructions to determine the names of person eligible for enrollment. Therefore, he made specific findings regarding certain persons' eligibility for membership and he established a list of 48 people who "have been placed on the Official Winnemucca Indian Colony Tribal Enrollment List" out of 106 potentially eligible persons.

Both parties appealed the Tribal Judge's decision. Due to lack of funding, the Intertribal Court of Appeals that would normally hear this case is not functioning. The parties, through counsel, stipulated to the appointment of a special appellate panel to hear appellate arguments and to issue a binding, non-appealable decision. The standard of review stipulated by the parties is as follows: *de novo* review of constitutional issues, *de novo* review of legal issues, and "any substantial evidence" review of factual issues.

STATEMENT OF FACTS

The WIC's membership initially included those persons listed on the 1916 census rolls, hereinafter known as the "List of 17". (Exhibits 36 and 84). When the WIC adopted a constitution, the Constitution provided that to be a member of the Colony a person must he at least 1/4 degree Paiute and/or Shoshone Indian blood AND they must be named or descended from person(s) named on the December 9, 1916 census of the Winnemucca Shoshone Indians. Further, no person can be a member of the Winnemucca Indian Colony if they have received money or land as a result of having been enrolled as a member of some other tribe.

In the 1980s, the BIA expressed concern that the membership rolls of the Colony included people who were not eligible for membership under the Constitution. (Exhibit 38b.) In 1994, the Colony adopted Enrollment Ordinance No. 310, which was approved by the Acting Area Director of the Phoenix Area Office of the BIA on July 12, 1994. On February 14, 1998, the WIC adopted a revised membership list which included 77 names (hereinafter known as the "List of 77".) This membership list was accepted by the Colony through their elected Council. The membership list was forwarded to the BIA for verification. The BIA did not approve the membership list because the Colony had not brought individual resolutions for each new member before the Colony Council for approval. (Exhibit 38a.)

As of February 21, 2000, the members of the Winnemucca Colony Council were Chairman Glenn Wasson, Vice Chairman Williams Bills, and members at large Thomas Wasson, Elverine Castro, and Lucy Lowery. On February 22, 2000, Chairman Glenn Wasson was murdered in front of the administration building of the Colony. As the Vice-Chairman, William Bills became the Acting Chairman of the Colony. The Council members thereafter split into two factions, as shown by their subsequent actions. One faction, hereinafter known as the Wasson Council, included Thomas Wasson, Elverine Castro, and Lucy Lowery. The other faction, hereinafter known as the Bills Council, included only William Bills.

At a meeting on February 28, 2000, the three members of the Wasson Council held a meeting at which they purported to appoint Sharon Wasson as a Council member to fill Glenn Wasson's vacant seat. (Exhibit 7.)

At a Council meeting on March 22, 2000, the seat vacated by Glenn Wasson was declared to be vacant and William Bills was declared to be the Chairman. (Exhibit 10.) By a separate resolution, an Enrollment Committee was established. (Exhibit 10.) Another resolution set a special/emergency meeting date for April 8, 2000 to fill the vacant Council seat.

After the regular Council meeting, three of the four remaining members, Thomas Wasson, Elverine Castro, and Lucy Lowery, held another meeting, the purpose of which was to appoint a replacement for

former member Glenn Wasson within thirty (30) days after the seat became vacant, as required by Article V, Section 1 of the Constitution. They elected Sharon Wasson to the empty seat on the Council. The three members acting at that time also stated their intent to call a special meeting to discuss, among other things, removal of Mr. Williams Bills from the council. (Exhibit 11.)

Article 3, Section II of the Bylaws allows special meetings to be called by a chair or the majority of the Council. The three members acting at this time constituted a majority of the Council. Further, Article V, Section 1 of the Bylaws allows the appointment of another council member "to fill the unexpired term." The Constitution and Bylaws do not specify where Council meetings must be held and they do not specify any notice requirements for special meetings. (Exhibit 1.)

From this point forward the two groups claiming to be the legitimate council diverged and each group continued to act and take action as if it was the legitimate Colony Council. At a meeting on March 24, 2000, attended by Sharon Wasson, Thomas Wasson, Lucy Lowery, and Elverine Castro, the Wasson Council voted to make Sharon Wasson Acting Chair of the Council while they attempted to address membership issues and removal of Mr. Bills. (Exhibits 11 and 12.) The Wasson Council sent a letter to Mr. Bills informing him of his removal from the position of Chairman and his opportunity to respond to the Council at a meeting on April 8, 2000. (Exhibit 13.) Although there

is no proof of service of this letter, Mr. Bills did appear at the April 8, 2000 hearing. There was not a quorum at the meeting. The meeting agenda does not contain an item regarding the removal of Bills and there is no evidence in the record that the removal of Bills was discussed at the April 8, 2000 meeting or that he was given a hearing or opportunity to oppose his removal.

On April 7, 2000, William Bills filed a Motion for Emergency Injunctive Relief in the Winnemucca Tribal Court. (Exhibit 15). This Motion sought an order against the other Council members ordering them to cease from interfering with the finances of the colony, and to turn over all bank account information and funds. On April 17, 2000, then-current Tribal Court Judge Kyle Swanson issued an order granted Bill's motion for emergency relief. (Exhibit 19.) The Wasson Group, through their attorney, filed a Motion to Dismiss the injunction dated April 19, 2000. (Exhibit 20.)

On April 11, 2000, the Wasson Council removed Mr. Bills as the Chair of the Committee and appointed Sharon Wasson Chairman, pursuant to Article VI, Section I of the Constitution. (Exhibit 17.) By Resolution dated April 24, 2000, the Wasson Council attempted to remove William Bills as a Council member. The three signatories on that resolution were Sharon Wasson, Lucy Lowery, and Thomas Wasson. (Exhibit 21.) However, until at least September 14, 2000, the Wasson Council continued to act as though Mr. Bills was a member of the council, listing

him as "absent without excuse" on many Council documents. (Exhibit 38a).

By Resolution dated May 2, 2000, signed by Elverine Castro, Lucy Lowry, Thomas Wasson, and Sharon Wasson, Kyle Swanson was purportedly removed from service as a Tribal judge. The Resolution indicated that a hearing on the matter would be held on May 13, 2000. (Exhibit 22.) Judge Swanson did not receive a copy of the Resolution regarding his removal until approximately two weeks, later, after the scheduled May 13, 2000 hearing. (Exhibit 25.) It is unclear from the record if the May 13, 2000 hearing took place.

Also on May 2, 2000, the same group of actors appointed Chuck Hartman as associate Judge of the Winnemucca Tribal Court. (Exhibit 23.) On May 23, 2000 this group entered into a Memorandum of Understanding regarding his term and compensation as associate judge. (Exhibit 28.) On August 9, 2000, Judge Hartman issued an Order removing William Bills from all tribal business, recognizing Sharon Wasson as Tribal Chairman, and ordering release of all tribal bank account funds to the Wasson Council. (Exhibit 31.)

William Bills sent correspondence to Judge Swanson dated May 18, 2000, instructing him to sit as Tribal Judge on May 19, 2000. (Exhibit 26.) By Order dated May 19, 2000, Judge Swanson issued his Order for Preliminary Injunction, which essentially gave control of the Colony's finances to Mr. Bills and

enjoined the Wasson Group from interfering with the activities of the Enrollment Committee.

On or about June 25, 2000, Council member Lucy Lowery died. On July 13, 2000, Tom Magiera was appointed to the Council to replace Ms. Lowery. (Exhibit 46.) By Resolution dated September 14, 2000, the Wasson Council disenrolled/banished William R. Bills. By Resolution dated October 16, 2000, the Wasson Council declared the seat vacant and appointed Andrea Davidson to the vacant seat. (Exhibit 47.)

Also on October 16, 2000, the Wasson group brought a Complaint and Motion for Temporary Restraining Order before Judge Hartman. On the same date, Judge Hartman issued a temporary restraining order restraining William Bills from entering the trust lands of the Winnemucca Indian Colony and issued an order to show cause at a hearing on October 31, 2000 why the order should not become permanent. (Exhibit 49.)

From the time of its appointment in March 2000, the Enrollment Committee continued to accept enrollment applications and enroll various people as members in the tribe. Both sides also held Council elections which each claimed to be the legitimate election to seat the legitimate Colony Council. After an election in October 2000, the Wasson Council claimed that its duly elected members were Thomas Wasson, Thomas Magiera, Elverine Castro, Andrea Davidson, and Merlene Magiera. After an election in

April 2001, the Bills Council claimed that its members were Allen Ambeler, Linda Ayer, Lovelle Brown, Charlene Dressler, and Lorinda (Toni) George. (Exhibit 64). For various reasons that are outlined in the record, both faction's elections had procedural and due process deficiencies.

On January 18, 2001, Judge Swanson issued an Order for Permanent Injunctive Relief and Restraining order, which found, among other things, that William Bills was the Acting Tribal Chair, that Sharon Wasson was not a Council member, and that the Wasson Council was ordered to refrain from interference or participation in the daily operations of the tribe's smoke shop. (Exhibit 34.) After appeals from Judge Swanson's Order, the parties had a trial before Judge Haberfeld. Both parties appealed Judge Haberfeld's decision and the following opinion results from the appeals of Judge Haberfeld's Order.

Although the following information was not in the record, counsel for the parties informed the Appellate Panel at oral arguments that Thomas Magiera died on June 30, 2002.

ISSUES

I. Whether the Trial Court's Order determining the members of the Winnemucca Colony Council is supported by substantial evidence and comports with the Constitution and Bylaws of the Winnemucca Indian Colony.

II. Whether the Trial Court's Order determining, the membership of the Winnemucca Indian Colony is supported by substantial evidence and comports with the Constitution and Bylaws of the Winnemucca Indian Colony.

III. Whether the Trial Court's Order determining the Tribal Judge is supported by substantial evidence and comports with the Constitution and Bylaws of the Winnemucca Indian Colony.

ANALYSIS

Winnemucca Colony Council

A vacancy was properly declared pursuant to Article V, Section 1 of the Winnemucca Indian Colony of Nevada Constitution (the "Constitution") shortly after the death of Glenn Wasson. William Bills ascended to the Chair position by virtue of being the Vice Chair. This ascension is permitted whenever the Chair is not able to fulfill his responsibilities under the Constitution.

The WIC Constitution at Article V, Section 1 provides that the remaining Colony Council members, after declaring a vacancy, shall appoint a successor to fill the unexpired term. On March 22, 2000 a majority of the Council appointed Sharon Wasson to the Colony Council according to the Constitution. The WIC Constitution at Article III, Section 1 states that a chairman shall be selected by the Colony Council from within its own members. On April 11, 2000, Sharon Wasson was selected by a majority of the

remaining Council members as Chair pursuant to the Constitution.

Article V, Section II of the Constitution provides for removal of members of the Colony Council. The Constitutional provisions for removal were not followed to properly remove Mr. Bills from the Colony Council. A letter marked Exhibit #13 from Sharon Wasson to William Bills gives notice to Mr. Bills of his removal and that a hearing was set for April 8, 2002. The notice was defective in that it did not have an address on its face for Mr. Bills, and there was no evidence of service. Mr. Bills appears to have had knowledge of the April 8th hearing because (1) he filed a legal action in another court the day before and (2) Mr. Bills showed up for the meeting on April 8, 2002, the Wasson group did not prove actual notice. There is considerable case law identifying the difference between actual notice and legal notice.

Mr. Bills, Thomas Wasson and one other Colony Council member were present at the April 8th meeting. Two other Colony Council members' car broke down and they were not in attendance at the meeting. The evidence provided in the record indicated that a number of topics were covered but no action was taken on the removal of Mr. Bills. The attempt to remove Mr. Bills from the Council was procedurally defective, was not completed, and, therefore, is ineffective.

As time went on, Mr. Bills' name continued to appear on official documents and the other council

members present would sign their initials that he was absent without an excuse. This evidence shows that even the Wasson Council continued to include Mr. Bills as a Colony Council member and Vice Chair through September of 2000.

On April 13, there was a recall petition date stamped and marked received on April 26th. However, the record does not reflect that the process was ever carried out for a recall of Colony Council members.

The WIC Constitution at Article V directs how a vacancy on the Colony Council is to he filled and Article IV of the WIC Constitution describes a quorum of three as necessary to transact business of the Colony Council. A quorum of the Wasson Council declared a vacancy when Lucy Lowery died. As stated in Exhibit #46 dated July 13, 2000, the Wasson Council declared a vacancy, took nominations and appointed Tom Magiera to the Wasson Council. Article II, Section 2 of the WIC Bylaws requires that each Colony Council member elected or appointed take an oath of office. Mr. Magiera took the oath of office as required by the WIC Constitution.

Exhibit #47 states that Mr. Bills was disenrolled or banished, that there was a vacancy on the Colony Council and that Andrea L. Davidson was appointed to fill the position declared vacant. The contents of Exhibit #49 do not illustrate any due process in trying to disenroll or banish Mr. Bills. There was not an effective disenrollment or banishment of Mr. Bills.

Therefore, there was no vacancy on the Wasson Council and Ms. Davidson was not validly appointed to the Wasson Council.

The election of October 28, 2000 was defective for a number of reasons including:

1) the election committee was not valid because only one member was a member of the Colony at the time;

2) there was an altercation which disrupted the process;

3) two of the election committee members were incarcerated; and

4) the polling place was changed at last minute to a different place than posted.

All these incidents resulted in an invalid election on October 28, 2000.

The Court reviewed the Order of Judge Swanson identified as Exhibit #30 dated January 18th, 2001 and information regarding the election proceeding. Judge Swanson exceeded his authority by ignoring the Constitutional election requirements.

On or about January 2001, Mr. Bills appointed an interim Colony Council, known as the Bill's Council in this opinion. The appointment of such a council was invalid and unconstitutional. There is absolutely no provision in the Constitution providing for the appointment of an interim Colony Council. There is no Constitutional provision for a single Council

member to appoint any other council members or to act as a Colony Council of one. For foregoing reasons, the Bills' council is invalid.

Membership List

One of the inherent powers of self-government is the power to establish the members or citizens of a particular tribe, nation, band, community or colony. Another power of self-government is to exclude people from the tribe, nation, band or community or colony's territories or lands. The Enrollment Ordinance is clear about how to apply for membership and identifies the appeal for denial of a membership application. The Constitution is silent on how a member loses their membership or how they are excluded from tribal territories or lands. The Enrollment Ordinance is also silent on the process to disenroll someone. The Constitution places great value on due process as illustrated in Article VIII. The Enrollment Ordinance reflects the importance of due process by providing for due process if one's application for membership is denied. It is not the place of the judiciary to carry out an inherent sovereign power to say who the members are of a tribe, nation, band, community or colony. The last known list approved by the validly constituted Colony Council, the body with the authority to declare who the members are of the Colony, was the "list of 77 from 1998."

The duly appointed Enrollment Committee, appointed by the remaining Council in March, 2000,

continued to act on enrollment applications throughout the past two years of chaos. Some membership applications were forwarded to the Council for approval and acted on by the council. There is no evidence in the records that these new membership approvals are defective. Any membership application which was approved by the Wasson Council, or the predecessor WIC Council, shall be added to the valid enrollment list of the Colony.

This Court is aware of the disproportionate number of Shoshone represented on the Colony Council and in the previous enrollment committee and that there are Paiutes who desire to be enrolled and may be eligible under the Constitution but are concerned about potential bias against Paiutes by enrollment committee members. The Colony is ordered to take steps to address this issue.

Tribal Judge

On April 7, 2000, William Bills filed a motion for emergency injunctive relief in the WIC Tribal Court requesting that the Wasson Group be enjoined from interfering with WIC financial matters. Kyle Swanson was the only sitting Judge of the WIC Tribal Court at that time. The Wasson Council had duly appointed him to his position in 1998. (See Exhibit 25). On April 17, 2000, the same day Bills' motion was served on the defendants; Judge Swanson issued an order granting Bills' motion for an emergency injunction. (Exhibit 19).

On May 2, 2000, the Wasson Council passed a resolution immediately removing Judge Swanson from office. (Resolution 5-2000-3, Exhibit 22). The stated grounds for his removal were that he presided over litigation in which a party was a close friend and did not hold hearings at a time and place provided by the WIC Law and Order Code. The resolution provided that a hearing would be held on Swanson's removal on May 13, 2000. It is unclear from the record whether the removal hearing scheduled May 13, 2000 hearing ever took place. Judge Swanson stated that he did not receive notice of his removal until three days after the scheduled hearing. He clearly was not given a fair hearing and an opportunity to respond to the charges.

Except for the resolution of removal itself, the record below does not establish that a written complaint to the Wasson Council was ever made by anyone against Judge Swanson. The record does support a conclusion that Judge Swanson did not receive notice of the charges made in the resolution for two weeks. His receipt of notice was three days after the scheduled May 13th hearing. Contrary to the clear requirements of the Code sections cited above, Judge Swanson was removed without any notice and prior to any hearing. Other sections of the Code were also violated. Section 1-40-100(b)(4) provides that hearings regarding removal of a judge shall be set at least thirty days but not more than sixty days in advance. Here, the removal hearing was set to take place eleven days after its passage.

The actions taken by the Wasson Council were clearly illegal under the WIC Code. They were also unlawful under the due process requirements of the WIC Constitution and under controlling federal law. Article VIII of the WIC Constitution provides that "No person shall be denied any of the applicable rights or guarantees as provided in Title II of the Civil Rights Act of 1968 (82 Stat. 77). The Federal Indian Civil Rights Act of 1968 (hereinafter ICRA) provides as follows:

> No Indian tribe in exercising powers of self-governmental shall . . . deprive any person of liberty or property without due process of law. 25 U.S.C. 1302(8).

Certainly, Judge Swanson had a property interest in his position as Tribal Judge. It is elementary law that due process generally requires notice and an opportunity to be heard prior to deprivation of a property interest. Those due process requirements are incorporated into the WIC Code but were not followed by the residual Council.

In her letter to Judge Swanson, Ms. Hearne apparently took the position that Judge Swanson's contract had simply expired. The Code, however, provides that the "Tribal Court shall consist of one Chief Judge and at least one or more Associate Judges" . . . and further that "all judges shall serve for a term of one year *and* until their successors take office" . . . (Code Sections 1-40-010 and 1-40-050). (Emphasis supplied). Judge Swanson was the only

judge serving on the Tribal Court when these events took place. He had held his position for two years. The resolution appointing Chuck Hartman clearly states he was appointed as an associate judge. The only logical conclusion is that Judge Hartman was not appointed as a successor to Judge Swanson and that, therefore, removal based on expiration of Judge Swanson's term is also illegal.

DECISION

Winnemucca Colony Council

I. The Trial Court's determination of members of the Winnemucca Colony Council is not supported by substantial evidence and does not comport with the Constitution and Bylaws of the Winnemucca Indian Colony in Nevada.

Mr. Bills was properly elevated to the position of Chair pursuant to the by-laws of the Winnemucca Indian Colony of Nevada Article I, Section II. Sharon Wasson was properly appointed to the Wasson Council and subsequently properly appointed Chair of the Wasson Council. The Court finds no hearing for removal of Mr. Bills was ever held. We find that the removal of Mr. Bills was defective resulting in the fact that Mr. Bills is still on the tribal council.

There was no recall of Wasson Council members because the recall process was not completed. Mr. Bills continued to serve and continues to serve on the Wasson Council. Tom Magiera was properly appointed to replace Lucy Lowery. After review of the documents,

this Court finds there was no proper procedure followed for the disenrollment of Mr. Williams. Therefore, it was inappropriate to declare a vacancy, nominate and appoint Andrea Davidson. The appointment of Andrea Davidson was defective, she is not a member of the Council and Mr. Bills remained and remains as a valid member of the Wasson Council.

The Court finds the Order of Judge Swanson dated January 18, 2001 invalid. The valid Colony Council that has survived to the present includes the following: Sharon Wasson, Thomas Wasson, Williams Bills, Elverine Castro and Thomas Magiera until his death.

Therefore, all subsequent activities of the Bills Council are found to be unconstitutional and invalid. The election held on April 2001 is declared an invalid election and in violation of the Constitution.

If the remaining, members of the Colony Council feel it necessary and appropriate to remove Mr. Bills as a member of the Colony Council and/or disenroll Mr. Bills, then the Colony Council must follow the Constitution and By-Laws including proper notice, procedure, and opportunity to he heard at a hearing. The Colony Council has the responsibility and duty to assure that due process is provided for in any ordinance or procedure in compliance with the Constitution in order to avoid any further defective disenrollment or defective removal of a Colony Council member.

The next Colony Council election scheduled pursuant to the Constitution would be October 2002. The Court and the parties have the desire for that election to occur on time. However, the serious situation the Colony faces today results from the chaos which began in February 2000 including the unconstitutional and invalid actions identified by this Court. Because of the need to identify who the Colony members are, the need to draft procedures to identify members and because the Constitution permits all Colony Council members to serve a term of two (2) years or until their successors are duly elected and seated, the October 2002 election shall occur within six months of October 2002.

The desire is for the Colony to definitively identify its members and hold a valid election with the purpose of bringing order to the Colony and making a future again for its members. This huge effort will require a complete and participatory Colony Council and active tribal members. If tribal members choose to be obstruct, uncooperative, petty and selfish, then this Colony will continue in chaos with no hope. The people have to care enough to move forward. The judicial and legal systems can do only so much.

Membership List

II. The Trial Court's determination of the membership of the Winnemucca Indian Colony is not supported by substantial evidence and does not comport with the Constitution and Bylaws or the Winnemucca Indian Colony.

Judge Haberfeld's Order is overturned in its entirety. The "list of 77 from 1998" is the valid list of the members of the Winnemucca Indian Colony of Nevada. Anyone who was added by previous Council or the Wasson Council from 1998 to the present shall be added to the "list of 77 from 1998".

Tribal Judge

III. The Court's determination of Tribal Judge is not supported by substantial evidence and does not comport with the Constitution and Bylaws of the Winnemucca Indian Colony.

We find that Swanson's removal as Tribal Court Judge was improper and illegal under the WIC Law and Order Code. (Hereinafter "Code"). Removal of Judges, Section 1-40-100(b)(1) of the Code provides that "no action will be taken except upon written complaint to the Tribal Council setting forth specific facts which justify removal." Section 1-40-100(b)(2) provides that the "judge shall be immediately notified of the charges against him." The Code further provides that "No judge shall be removed except following a hearing on the complaint and a *subsequent* decision by the Tribal Council that removal

is appropriate." (Code Section 1-40-100(b)(3); (emphasis supplied).

We agree Judge Haberfield's determination that the attempted removal of Judge Swanson and the appointment of Judge Hartman was a reaction to a negative decision issued by Swanson and an attempt to create a Tribal Court more to the liking of the residual Council members.

We hold that WIC Tribal Court Judge Swanson was not legally removed from office according to the requirements of WIC's laws. He is legally authorized to hold the office of Judge of the WIC Tribal Court.

ORDER

1. The Order of Steven Haberfeld, issued on May 9, 2002, is reversed and vacated.

2. The WIC Colony Council is Sharon Wasson, Thomas Wasson, Williams Bills, Elverine Castro. There is one vacancy created by the death of Thomas Magiera.

3. The WIC Colony Council shall declare a vacancy on the Colony Council because of the death of Thomas Magiera immediately and within 30 days of this order appoint a successor to fill the unexpired term of Thomas Magiera.

4. The WIC Colony Council shall serve until their successors are duly elected and seated or any member is duly disenrolled or banished.

5. The October 2002 election of the WIC shall occur within six months of October 2002.

6. The WIC Colony Council shall set time lines within the next six months of the date of this Order for the following:

   a. amend the enrollment ordinance within 45 days of this order to provide procedures for appealing a denial of an application including due process provisions and to provide procedures to disenroll a member including due process provisions;

   b. the enrollment committee shall publish notice and post notice announcing that anyone who wishes to he enrolled should contact them and follow application procedures;

   c. the enrollment committee shall publish notice and post notices announcing that anyone who wishes to disenroll someone else should contact them and follow the disenrollment procedures; and

   d. the Colony Council shall take every step to assure a tribal election is held within six months of October 2002.

7. The WIC Colony Council shall appoint a validly constituted enrollment committee, if one does not exist, within 10 days of this order. The Court orders the Colony Council to address the real or perceived bias in favor of Shoshone by requiring the following:

a. The Colony Council shall make every attempt to be sure that there are equal numbers of Paiute and Shoshone on the enrollment committee;

b. That any appointment of members are members who have open minds and will look at the facts in front of them without bias for tribal or family or any other political loyalties.

8. The WIC Colony Council shall establish standards reflecting the due process required by the Constitution in denying an application for membership and in disenrolling members. The process for denial of a membership application and the disenrollment of a member shall include:

a. notice of actions to be taken or taken;

b. publish timelines for each process;

c. service of process methods;

d. written reasons for denial of an membership application and disenrollment;

e. hearing and hearing procedures, if any;

f. in disenrollment processes the burden is upon the person bringing or requesting the action of disenrollment; and

g. appeal and appeal procedures including the use of an independent body or court.

9. The WIC Colony Council shall contact the United States Department of Interior Bureau

of Indian Affairs office for the last address list for members of the Colony.

Signing for the Appeals Court of the Winnemucca Indian Colony in Nevada:

Date: 8-16-02 /s/ Lenor A. Scheffler
Lenor A. Scheffler
Chief Judge

Certified by:

/s/ Dana Klin
Acting Clerk of Court

IN THE WINNEMUCCA TRIBAL COURT AND FOR THE WINNEMUCCA INDIAN COLONY, WINNEMUCCA, HUMBOLDT COUNTY, NEVADA

William Bill. Acting Tribal Chairman for the WINNEMUCCA COLONY, and et al

Plaintiffs

vs

SHARON VASSON, LUCY (WASSON) LOWERY, ELVERINE CASTRO AND THOMAS WASSON (aka) BUSINESS COUNCIL OF THE WESTERN BAND OF THE WESTERN SHOSHONE) all individually and in their capacity as council members of the Winnemucca Colony Council and DOES 1-100

Defendants

Case Number CV1003

Before: Steven Haberfeld, *pro tem* Tribal Court Judge
Appearances: Treva J. Hearne, Esq.,
Counsel for Defendants
Donald Pope, Esq.,
Counsel for Plaintiffs
Brian R. Morris, Esq.,
Counsel for Plaintiffs

THIS MATTER came before *pro tem* Judge Steven Haberfeld of the Winnemucca Colony Tribal Court on October 24th and 25th (2001), November 13th, 14th and 15th (2001), March 11th and March 23rd (2002). It came before this Court as a result of a

decision by the Inter-Tribal Court of Appeals of Nevada, and a stipulation by the parties, that the following issues be remanded to be heard and resolved by a Trial Judge:

A. The names of the members of the Winnemucca Indian Colony who are eligible for enrollment.

B. The identity of the proper and legitimate members of the Business Council of the Winnemucca Indian Colony at the present time.

C. The identity of the Tribal Judge, other than the *pro tem* Judge, legally authorized to hold such office for the Colony at the present time.

It was further ordered by the Court and stipulated by the parties that:

D. The *pro tem* Tribal Court Judge would be mutually selected by the parties to resolve and decide said issues.

E. The *pro tem* Tribal Court Judge would conduct a trial to receive evidence and to make findings of fact and conclusions necessary and appropriate to resolve the issues stipulated for determination.

F. The parties agree to each pay one half of all costs incurred.

G. The parties may present such other issues as they deem necessary to resolve the case, subject to the Judge's ruling on their relevance.

H. Status reports together with a time schedule for the completion of the trial on this matter shall be filed every fourteen (14) days.

I. Either party may appeal the final determination of this matter by the Trial Judge to the Inter-Tribal Court of Appeals of Nevada.

BACKGROUND

The federal government created, by Executive Order (No. 2639), the Winnemucca Indian Colony (WIC) on June 18, 1917. It set aside a total of 340 acres near the town of Winnemucca for "homeless Indians" living in the area. Subsequent to the establishment of the WIC, on June 11, 1935, the Indians living there voted to organize under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984). They formed a representative form of government, the powers and responsibilities of which were described in a written Constitution & By-laws that was later approved by the Assistant Secretary of the Interior on March 5, 1971.

The WIC Constitution incorporated certain fundamental democratic principles required of tribes that chose to organize under the IRA. Ultimate decision-making power and authority rests with the general members, acting collectively in General Council. They then may delegate specific responsibilities to an elected Tribal Council that is responsible for managing the day to day affairs of the tribal government. There are five elected Tribal Council members who

serve two-year terms. These leaders are accountable to the members for their behavior and may be removed for cause provided due process procedures are followed. Decisions by the members in General Council, and by Tribal Council members, are made by majority rule. According, to the WIC Constitution, rights of the minority are protected and individuals retain all rights guaranteed by the United States Constitution (Article VII, Power of the People, and Article VIII, Rights of Members).

The Winnemucca Indian Colony's government has been in a major crisis since February 2000. The Bureau of Indian Affairs has deemed it "dysfunctional" and no longer maintains a "government to Government" relationship with it. As a result, the WIC cannot obtain grants from or enter into contracts with federal government agencies that provide funds, programs, and services tribal governments typically depend on to meet the basic needs of their members.

At the heart of the crisis is a lack of agreement among WIC members about two fundamental questions. There is disagreement about what is the legitimate elected Tribal Council that is responsible for managing the Colony's government and representing it in external transactions. At this time, there are two factions that purport to be the legitimately elected representatives of the WIC membership, each pointing to an election they organized in the community that brought them to power. The second and related issue revolves around who is a WIC member and thus entitled to chose a government for the Colony.

This second question regarding WIC membership has never been definitively resolved since the Colony's inception. While originally reserved for homeless Indians, membership was made more restrictive when the WIC Constitution was adopted in 1935. Members had to either appear or be descended from people who appeared on the 1916 base census rolls, and they had to be at least ¼ Shoshone and/or Paiute. This left out some people who resided on the Colony but could not trace their families to the 1916 census roll. To this day, many of the Indian people living on the Colony are precluded from participating in the government that makes decision that directly affect them. There has been yet another source of difficulty in regards to who is member. The United States government, in creating WIC, attempted to combine people from two distinct tribes into one community. As members attempt to work out their everyday political control issues, the cleavage between the Shoshone and the Paiute people has never been completely overcome and has contributed to bringing the WIC community to its current crisis.

In the early summer of 2000, after being unable to resolve the conflicts over leadership and membership within the WIC government's legislative branch, one of the factions took the matter to the WIC Tribal Court for resolution. The Tribal Court Judge, Kyle Swanson, issue a ruling. Yet, because the defendants in the case refused to accept the Court's authority and decision, and in fact "removed" the judge, the conflict was not resolved at the Tribal Court level

either. The controversy at the Winnemucca Colony eventually ended up before the Intertribal Court of Appeals of Nevada for review. The Appeals Court remanded the matter back to Tribal Court, obtaining agreement from both parties that they would jointly appoint a mutually acceptable *pro tem* Tribal Court Judge who would have the authority to decide three very fundamental questions regarding the future of the Winnemucca Colony and its government.

SCOPE OF THIS COURT'S AUTHORITY

According to instructions issued by the Intertribal Court of Appeals, there are three questions that are to be resolved by this Court: (1) Who is eligible to be a member of the Winnemucca Indian Colony? (2) What is the legitimate Tribal Council at the present time? (3) Who is legally authorized to hold the office of Tribal Judge at the present time? These are complex and interrelated issues that need to be analyzed over a considerable period of time. In answering what is the legitimate Tribal Council, for example, four different Councils that were operative for certain periods of time since February 22, 2000 have to be considered. Who is the Judge is closely linked to what is the legitimate Council since one group purporting to be the official Council removed him. For this reason, and in the interest of clarity, these two issues will be taken up together and will be the focus of the first section of the decision. The question regarding who is eligible to be a WIC member spans even a longer period, dating back to 1916 when the base roll

for WIC was established. This question is addressed in the second section of this decision.

SUMMARY OF DECISION

This Court finds that Tribal Court Judge Swanson was improperly removed and remains legally authorized to serve as the WIC Tribal Court Judge. Moreover, this Court finds that currently there is no WIC Tribal Council that has been legitimately formed and that can purport to be representative of a cross section of interests in the Winnemucca Colony. A new Tribal Council election must be held as soon as possible to restore the WIC government. However, there currently is no official WIC Enrollment List and thus no agreed upon basis for determining who is eligible to vote in the Tribal Council election. Given these findings, this Court has created an Enrollment List of 49 WIC members who meet the WIC Constitution's eligibility criteria. All people on this list who are 21 or more years of age shall constitute an Eligible Voters List and may vote in the upcoming election in October 2002. This Court will oversee the administration of this election and maintain jurisdiction until it has certified it and sworn in a new Tribal Council. According to an agreement reached by both the plaintiffs and defendants during the trial, Indian Dispute Resolution Services, Inc., a national non-profit Indian organization that specializes in conducting impartial democratic Tribal Council elections, shall administer the October 2002 election. It shall do so in conjunction with a five-person tribal Election Committee

according to an Election Procedures Agreement to be formulated by this Committee

DECISION

Section I: What is the legitimate WIC Tribal Council and who is the legally authorized Tribal Court judge?

In answering the question what is the legitimate Council today, if any, we focus on the period after February 21, 2000 up to the present. Prior to February 21st, there was a legitimate Council operating at the Colony according to a stipulation made by both parties.

As of February 21, 2000, Glenn Wasson was serving as Chairman, William Bills was serving as Vice Chairman and Thomas Wasson was serving as the Secretary/Treasurer. Elverine (~~Wasson~~) Castro and Lucy [Wasson] Lowery were serving as members-at-large.

On February 22, 2000 Chairman Glenn Wasson was murdered. Upon his death, William Bills, the bona fide Tribal Vice Chairman, assumed leadership responsibilities as the Acting Chairperson in accordance with the WIC Tribal Constitution and Bylaws. However, soon afterwards, the three other remaining elected Council members and their associates tried to wrest control away from him and later tried to remove him.

Unknown to Acting Chairman William Bills, at a "special meeting" on February 28, 2000 to which he was not invited, and was outside the authority of the recognized Tribal Council, Elverine Castro and Thomas Wasson made themselves official tribal check signers. So did Sharon Wasson who was not an elected Council member but represented himself as such in a notice to the Bank of America (Exhibit #5). The new check signers authorized specific purchases and wrote checks on the WIC tribal accounts without the knowledge of the Acting Chairman and the authority of an official Council motion or resolution. Included in these unauthorized purchases was a 1999 Daewoo automobile valued at more than $20,000.

On March 22, 2000 an official Tribal Council meeting was held with Acting Chair William Bills presiding. A large group of tribal members attended this meeting. There were thirty-nine members according to the meeting minutes. Six official Tribal Resolutions were passed, including one that created a new Enrollment Committee to address a longstanding problem at WIC – the creation of an official list of persons eligible for tribal enrollment. The Tribal Council agreed not to fill the vacant seat of deceased Glenn Wasson until this enrollment list was developed and approved. According to official minutes of this meeting, Fred Drye from the BIA's Western Nevada Agency gave explicit support to the WIC Council's decision to waive the Tribe's Constitutional requirement to fill vacancies within thirty (30) days. He urged the Colony to first create and approve an enrollment list.

In the afternoon of March 22, 2000. shortly after they adjourned the WIC Council's official meeting, Elverine Castro, Lucy Lowery and Thomas Wasson, three of the four remaining Council members, held the first in a series of secret closed meetings. The purpose was to reverse the major decisions that had been made by the Tribal Council earlier in front of the large group of tribal members who attended the meeting. The other purpose was to remove Mr. Bills from the position of Acting Chairman and from the Council, and to replace Mr. Bills with their own Chairman.

The breakaway group represented its meetings as the official meetings of the tribal government, under the special meeting clause of the Tribal Constitution. However, neither the Acting Chairman nor the general membership of the Tribe was notified of the dates and locations, or of the purpose and agendas of these meetings. These secret and closed meetings were held in Susanville, California several hundred miles away from Winnemucca.

At the meeting in the afternoon of March 22, 2000, followed by another meeting on March 24th, the breakaway group came up with a list of charges that allegedly justified William Bills immediate removal from office, and from the Council entirely. He was sent a letter informing him that he had already been removed. In the same letter, he was instructed to appear at the next meeting that had been scheduled by the official Tribal Council on April 8, 2000 to answer the charges made against him.

At their March 22nd and 24th meetings, this breakaway group appointed Sharon Wasson to its Council as its new Chairman. This group took this action in spite of the fact that at the official Tribal Council meeting on March 22, 2000, three of its members initiated and approved a formal tribal council resolution that prohibited it. The Tribal Council had gone on record that the vacant chairman's position would not be filled until the newly formed enrollment committee developed an approved list of eligible WIC members.

Acting Chairman William Bills attended and presided over the officially scheduled Tribal Council meeting on April 8, 2000. Only Thomas Wasson and Sharon Wasson were present from the illegal group. Mr. Bills answered some of the allegations made in the letter he received. However, there was no formal hearing.

The breakaway Sharon Wasson "Council" went on to represent itself with the BIA, the banks where the Tribe had accounts, and the public, albeit as the Western Band of Western Shoshone, as the new official Winnemucca Tribal Council. Moreover, it represented Sharon Wasson as the new legitimate Tribal Council Chairman.

William Bills brought a legal action before presiding Tribal Court Judge Kyle B. Swanson of the Winnemucca Indian Colony. He challenged the legitimacy of Sharon Wasson as the new Chairperson and the new Sharon Wasson Tribal Council. On April 17, 2000,

Judge Swanson issued a Temporary Restraining Order and found that:

(a) plaintiff Mr. William Bills is duly seated and the Acting Tribal Chairman of the Winnemucca Indian Colony;

(b) defendant Sharon Wasson is not a duly elected or appointed Tribal Chair or Tribal Council member of the Winnemucca Indian Colony as a result of being elected or appointed by defendants THOMAS WASSON, ELVERINE CASTRO and LUCY (WASSON) LOWERY AT THE INVALID MEETING OF THE "Western Band of the Western Shoshone" which is not the Federally recognized representative governing body of the Winnemucca Indian Colony;

(c) pursuant to the Winnemucca Tribal Law & Order Code, plaintiff William Bills properly assumed the role as Acting Tribal Chairman lawfully and shall remain seated as the acting Tribal Chairman until such time as an enrollment list and list of eligible voters is approved and certified and a valid election is then held in accordance with the Constitution and Bylaws and the Election Ordinance of this Tribe; and

(d) the Winnemucca Indian Colony does not have a valid list of enrolled members.

After Judge Kyle Swanson issued his Temporary Restraining Order on April 17, 2000 preventing the removal of Acting Chairman Bills, Sharon Wasson et al began to take steps to remove Judge Kyle Swanson

and create their own tribal court. On April 19, 2000, Treva Hearne filed, on behalf of the defendants, a motion to dismiss the Motion for Emergency Injunctive Relief, arguing among other things that Mr. Bills could not bring the matter before the Judge as WIC Chairman since he had been removed from office.

Instead of appearing before Judge Swanson on June 14, 2000 to show cause as per his instructions, they requested and obtained a "continuance" to allow for sufficient time for the defendants' advocate, Glen Hardin and their attorney, Treva Hearne, to take care of personal and medical issues. However, subsequently they never responded to Judge Swanson's request for an available date to hear the case.

On May 2, 2000, Sharon Wasson's "Council" passed a resolution (#5-2000-002 – Exhibit 22) removing Judge Swanson on the grounds that he allegedly was a close friend of William Bills and did not recluse himself from the case. It scheduled a hearing on May 13, 2000 to afford the judge the right to answer the charges. At the same time, however, this "Council" adopted another resolution (5-2000-002) appointing its own judge, Charles Hartman, as Associate Judge of the Winnemucca Tribal Court, to hear the case brought by Mr. William Bills.

The defendants' attorney, Treva Hearne, on or about July 12, 2000, informed Judge Swanson that he no longer had a contract to provide judicial services to the Tribe, thus asserting that he did not have proper jurisdiction and continued authority in the court

proceeding. In addition, Ms. Hearn, on behalf of her clients, questioned the Court's authority to hear cases that involved tribal government operations.

Acting Chairman Bills continued to serve as the Acting WIC Chairman through the summer and fall of 2000 and the Spring of 2001 despite the challenges to his authority initiated by Sharon Wasson et al during this period.

Judge Kyle Swanson's issued his final decision on January 18, 2001. He upheld the Plaintiff's Amended Motion for Injunctive Relief and Ex-Parte Motion for Injunctive Relief. The Tribal Court thereby finally and unequivocally affirmed Mr. Bills' legitimate authority as the Acting Tribal Chairman. The Court directed Mr. Bills to "remain seated as the Acting, Tribal Chairman until such time as an enrollment list and list of eligible voters is approved and certified, and a valid election is then held in accordance with the Constitution and Bylaws and the Election Ordinance of this Tribe."

On January 21, 2001, once Judge Swanson issued his final decision, Acting Chairman Bills formed an Interim Tribal Council and took steps to fill outstanding vacancies. He filled the seat of Mr. Glenn Wasson who had been murdered almost a year before. He filled the seat of Lucy Lowery who had died during the past year. He also filled the seat of Elverine Castro who was alleged to have falsified her WIC tribal enrollment application, thus concealing her membership with another tribe so that the other tribe would not

remove her from its rolls because of her dual membership. Mr. Bills retained on the Interim Council Thomas Wasson who, other than himself, was the only other remaining member of the former Glenn Wasson Tribal Council.

In late January 2001, the Western Nevada Agency of the BIA took the position that William Bills' Interim Council should restrict its activities solely to finalizing the list of people eligible to enroll and vote in tribal Council elections, and to conduct a new Tribal Council election. Although the regional BIA office in Phoenix, Arizona ultimately overrode this decision by its Area office as undue interference with the tribe's sovereignty, no one disagreed that the Tribe needed to establish an approved enrollment and voter registration list before holding its next election.

Mr. Bill and his Interim Council began to organize a new Tribal Council Election for the last part of April 2001. Already mentioned above, a Resolution (#5) was passed at the last regular WIC Tribal Council meeting on March 22, 2000 forming a Tribal Enrollment Committee to up-date and act on all enrollment applications. Although the members appointed to the new Committee from the Sharon Wasson group boycotted the Committee, the remaining members proceeded to review applications for enrollment and to develop an inclusive list of people who were eligible to be WIC members and to vote in WIC tribal elections.

Mr. Bill's Interim Council held its Tribal Council Election on April 28, 2001. It defined very broadly who was eligible to participate in the election. It produced a "documented list" of all those who submitted their applications and were approved. It produced as well an "undocumented list" of those people who had not resubmitted their applications but who had been on a list of 77 persons submitted to the BIA in 1990, and who had been on the list used by the Sharon Wasson Council. It developed a third list of all the people who resided in the Colony but who had historically been precluded for one reason or another from being considered eligible to enroll in WIC.

Mr. William Bills' Interim Council was not the only group to conduct a new Tribal Council election in the Winnemucca Indian Colony during this time. Sharon Wasson's "Council" conducted its own election already on October 28, 2000. Both groups today contend that they adhered to the appropriate provisions of the Tribe's Election Ordinance and to the Tribes Constitution & Bylaws.

FINDINGS

A. Who is legally authorized to hold the office of WIC Judge at the present time?

The answer to this question depends on which Tribal Council was legitimate at the time of Judge Swanson's removal and thus who had the authority to remove or

retain him. It also revolves around the process used to remove him.

1. The Sharon Wasson "Council" was illegally formed and acted illegally, and therefore did not have the authority to conduct the official tribal business of the Winnemucca Indian Colony, including removing William Bills from the position of Acting Chairperson and later from the Council and from the Tribe. Nor did it have the authority to remove the Tribal Court Judge.

2. This Court finds that Sharon Wasson's "Council" acted illegally when it called a series of secret meetings in February, March and April of 2000 with the intention of undermining the authority of the Acting Chairperson and reversing formal decisions it had initiated and approved at the official Council meeting in front of over thirty interested tribal members. (Minutes of the Special Meeting of the Winnemucca Indian Colony, March 22, 2000 at 2:20 pm.) The Acting Chairperson was not notified of this breakaway group's meetings, nor was the general membership. Moreover, had the WIC tribal members known of the meetings, which they did not, the great distance away from Winnemucca would have made it prohibitive for them to exercise their democratic right to attend and observe the activities of their elected representatives. By holding these closed secret meetings, these lawmakers violated their Tribal Constitution and failed to meet their basic obligations to their

constituents under a democratic and representative form of government.

3. The Sharon Wasson "Council", at an illegal meeting, appointed Sharon Wasson to fill the vacant position of WIC Tribal Chairperson when there was already an Acting Chairperson who had not yet been removed properly. This violated Article V, Section 2, *Removal* provisions of the WIC Constitution. It also violated a formal resolution passed by the official Council on March 22, 2000 delaying the appointment of a chairperson until a WIC Enrollment List was prepared and approved.

4. Had the Sharon Wasson "Council" had the authority to remove Acting Chairperson William Bills, which it did not, it would be faulted for not having done it properly. This Court finds that Acting Chairman Mr. William Bills was not properly removed from office. Article V *Vacancies, Removal and Recall.* Section 2 of the Tribe's Constitution, provides a council member or officer accused of improper conduct or gross neglect of duty "full opportunity to reply to any and all charges at a designated meeting. Article VIII *Rights of Members* further states that "no member shall be denied any of the rights or guarantees enjoyed by non-Indian citizens under the Constitution of the United States, including but not limited to . . . the right to petition for action, or the redress of grievances, and the due process of law."

5. There was no formal hearing that could meet the standards laid out in the Tribal Constitution (Article VIII – *Rights of Members*) or satisfy basic rights to due process guaranteed by the U.S. Constitution to all American citizens. Moreover, in replacing Mr. Bills with Sharon Wasson as its new Chairman before a hearing to consider the allegations made against Mr. Bills, this in effect found the Acting Chairman "guilty" without providing him any semblance of "due process" that the WIC Constitution guarantees.

6. This Court finds that WIC Tribal Court Judge Swanson was not legally removed from office according to the process laid out in the Tribe's Law and Order Code, Title I Tribal Court, Section 1-40-100 *Removal of Judges*. He therefore continued to have legal authority and jurisdiction, and is legally authorized to hold such office for the Colony up to the present time. The Sharon Wasson "Council's" attempt to replace Judge Swanson was improper and illegal for the following reasons:

    a. The "Council" itself was illegal and thus had no authority to remove the WIC Tribal Judge

    b. The "Council" violated the Winnemucca Indian Colony Law & Order Code that outlines the proper steps to be taken in removing a presiding Judge. According to Title I, *The Tribal Court*, section 1-40-100 *Removal of Judges,* (a-c), once a

Tribal Council receives a complaint regarding its judge it has only two options. It can either dismiss it because it is "frivolous", or it has to have a hearing on the complaint regarding the appropriateness of removal. The hearing has to be noticed and conducted in such a manner as to accord the judge due process. The judge must be given a written complaint that sets forth specific facts that justify removal, and he or she must be notified immediately. There was no such written complaint. Nor was the judge informed immediately. In fact, he received notice of the hearing three days after it was scheduled to occur. A hearing has to be set between 30 and 60 days in advance. It was not. Instead, it was scheduled eleven days after the resolution was passed. Finally, the judge has to be given an opportunity to present evidence and make a statement to the Tribal Council in support of his or her contentions. He was never given this opportunity. In not following these required steps, the Sharon Wasson "Council" ignored its legal obligations to protect the Judge's rights to due process.

7. This Court finds that Treva Hearne's and her clients' proposition that Judge Kyle Swanson's contract had expired was incorrect. Acting Chairman William Bills, who never was properly removed, wrote a letter to Judge Swanson, dated May 18, 2000, on

Winnemucca Colony Council stationary, making it clear that any suspension was an illegal and unwarranted interference with the Tribal Justice system. In his letter, he wrote that any resolution, notification or any correspondence concerning the administration of the Winnemucca Indian Colony from any individual other than himself should be disregarded, and that Judge Swanson's judicial services were expected and required by the Tribe (EXHIBIT #26).

8. The proposition advanced by the defendants that the Tribal Court does not have jurisdiction over tribal government operations is self-serving and without legal or logical foundation. First, the defendants' attorney, Treva Hearne offered no legal authorities to justify the denial of such jurisdiction. Furthermore, nothing in the Tribe's Constitution and Bylaws or Law & Order Code would specifically prohibit the Court from having such jurisdiction. Finally, if the Tribal Court shall not have such jurisdiction, who does? The Bureau of Indian Affairs, the agency that historically has been available to help Indian tribes sort out their internal affairs, and has served as the adjudicator in a structured appeal process, has gradually opted out of performing this function. It currently maintains that such intervention violates the agency's policies of encouraging tribes to exercise their inherent sovereignty and rights to self-determination.

9. When the legislative and executive branches of government in a democratic political system prove to be incapable of orderly and informed decision-making and fail to resolve a major conflict that threatens the viability of the government, there needs to be an independent judiciary that can serve as the final adjudicator and get the government back on track. The U.S. Supreme Court's decision to step in to resolve the 2000 Presidential Election that Congress was unable to resolve by itself would seem to serve as an excellent case in point.

10. This principle has application in Indian country as well. It is exemplified in the Inter-Tribal Court of Appeals of Nevada's decision to order the Winnemucca Indian Colony to select a *pro tem* Tribal Court Judge to resolve three critical internal issues when the members of Winnemucca Indian Colony were unable to resolve them by themselves. The implication is that having judicial intervention available is not only useful but essential to the preservation of legitimate and stable tribal government. That both parties to the dispute agreed by stipulation to mutually select a *pro tem* Judge to hear and resolve outstanding internal issues should be interpreted as both parties having finally accepted the compelling, wisdom of the principle of tribal court review of a tribe's government operations.

11. In the final analysis, the Sharon Wasson "Council's" removal of Judge Swanson and

the appointment of Associate Judge ~~Hardin~~ [Hartman] as his replacement was an attempt to create a Tribal Court more to its liking and was a unauthorized and cynical interference with the Tribe's judicial process. When tribal leaders replace a judge when they do not like his decision, they make a mockery out of a tribe's judicial system, and deprive tribal members of what may be one of the last safeguards against the abuse of power by an illegal tribal government.

B. Who are the proper and legitimate members of the WIC Tribal Council at the present time?

1. At this time, there is no properly formed WIC Tribal Council that can hold itself to be representative of a cross-section of WIC tribal members and can enjoy the legitimacy a tribal government needs to restore stability and confidence among its members.

2. Sharon Wasson's "Council" was illegal and illegitimate and therefore could not act as the tribal government in any matter, including the administration and certification of an official tribal election.

3. The Tribal Election held by the Sharon Wasson Council on October 28, 2000 was illegal. Furthermore, this Court maintains that even if the Sharon Wasson "Council" were legal, which it was not, the election would have to be voided because of its organizers' failure to follow the Tribal Election Ordinance and

democratic principles embodied in the WIC Constitution. The most glaring omissions and commissions were as follows:

4. The Sharon Wasson "Council" deliberately restricted participation in its election. It boycotted the official enrollment Committee established by the legal Tribal Council at its March 22, 2000 meeting. In addition, in the election advertisement this group ran in the local Humboldt County newspaper (Exhibit #52), the Wasson "Council" referred to itself as the "Home of the Western Band of Western Shoshone." This is not a federally recognized tribe. Moreover, according to testimony by the plaintiffs this was taken as evidence among potential voters that Paiute people were not welcome to vote even though a WIC member can either be Paiute or Shoshone according to the WIC Constitution.

5. Certain applicants for enrollment were denied consideration and were denied a forum in which they could appeal their exclusion, thus denying them their constitutional right to redress of grievances and right to due process.

6. There was insufficient insulation of the election process from manipulation by the candidates. Two candidates, Thomas Magiera and Thomas Wasson, were involved in conducting the election according to a video film presented as evidence to the Court by the defendants. Mr. Wasson was involved in the

vote count and was shown asking whether a particular vote counted.

7. The list of candidates was not shared with this "Council's" own member list even though the Election Ordinance explicitly calls for such advance notice.

8. The secrecy and integrity of voting by absentee ballot was compromised by the lack of attention to process. Ballots were sent to a post office box to which several people had periodic and unsupervised access. No one logged in absentee ballots received by mail to determine how many and from whom these were received. Nor was there any authentication of the absentee voter to determine whether the person casting the ballot was on the eligible voter list, and whether the person voted more than once in the election i.e. by absentee ballot and by direct vote at the polls.

9. Members were not notified or advised about an explicit appeal process to use if they were interested in protesting, aspects of the election process or the results.

10. Given the very low voter turnout and the fact that the newly elected Council is primarily made up of the Magiera family, it cannot qualify as an election that could generate broad based support for the new leaders.

11. Mr. William Bills was entitled to continue to serve as the Acting Chairman until he was properly removed. Mr. Bills formed an Interim Council in January 2001 for the express

purpose of organizing a legitimate tribal election in April 2001, electing a new Council, and then going out of business.

12. The Tribal Council Election conducted on April 28, 2001 by William Bills' Interim Tribal Council provided maximum opportunity to the broadest possible number of eligible voters to participate in its election. It also made a full effort to comply with the BIA's and Judge Swanson's requests that, before an election is conducted, the Tribe create and implement an open and impartial process for systematically reviewing and qualifying tribal members eligible to enroll and thus vote in their tribe's election.

13. There were no major procedural irregularities that would invalidate the April 28, 2001 election. What was noted was the absence of certain safeguards that would have better ensured that absentee voters submitting ballots were identified and crossed off the voting list to make certain they did not vote more than once. In addition, more steps should have been added to ensure that persons running, for office neither appeared to have nor actually had anything to do with the administration of the election.

14. The process by which Elverine Castro was removed and replaced by Acting Chairman Bill's Interim Council was arbitrary and undemocratic. It was in violation of the Tribal Constitution and did not accord her a hearing by which her constitutional rights to due

process were protected. However, this was an error committed by the Interim Council and not an irregularity in the election process.

15. The April 28, 2001 election was nonetheless flawed, in this Court's opinion, through no fault of the Interim Council that conducted it. An important segment of the people who consider themselves to be WIC members did not participate in choosing their elected leaders. They refused to submit their enrollment eligibility data and to participate in the April 28, 2001 election in part because they believed they already had conducted a proper election and already had elected a legitimate Tribal Council on October 28, 2000. By withholding, their cooperation and collaboration with William Bills' Interim Council in developing a list of eligible tribal members, they effectively forestalled any proper tribal election and left this as a task that still must be completed before a proper WIC tribal election can be held.

Section II: Who is eligible for enrollment in the Winnemucca Indian Colony?

The Winnemucca Indian Colony should schedule a new tribal council election as soon as possible and provide the fullest opportunity to all eligible tribal members to participate in choosing their elected representatives. However, before there can be an election, there must be an official tribal enrollment list in existence to determine who is eligible to vote.

According to the Tribe's Election Ordinance #301 (Exhibit 2) "any enrolled member of WIC who has attained the age of twenty-one (21) years or older shall have the right to vote, provided his/her name is on the Eligible Voters List."

A. Is there an established WIC Tribal Enrollment List that can be used at this time?

Extensive evidence was submitted to this Court suggesting that WIC has had difficulty over the years establishing an agreed upon membership roll. Tribal Court Judge Swanson ruled in January 2001 that WIC had not established such a list. The Intertribal Court of Appeals of Nevada also acknowledged the problem by ordering on June 28, 2001 the WIC Tribal Court to resolve "the names of the members of the Winnemucca Indian Colony who are eligible for enrollment".

Over the years, the Bureau of Indian Affairs, both the Western Nevada Agency and the Western Regional Office in Phoenix, Arizona have repeatedly urged the WIC to resolve its membership issues. In 1985, Superintendent Hunter of the Western Nevada Agency withdrew recognition from the Winnemucca Tribal Council "because it was determined that the council members did not meet the membership criteria contained in the Constitution and Bylaws." (letter from the Superintendent to WIC Chairman dated December 13, 1990-Exhibit #82)

Back in July 1990, an Interim WIC Tribal Council established a tribal membership roll of seventeen (17) adult members (Exhibit #84) that it suggested serve as the official and complete WIC Enrollment List. However, this appears to have been incomplete. While the BIA recognized all seventeen on the list as eligible members, it pointed out that there were at least five other persons who met the same criteria, who it certified as eligible for membership on October 11, 1990. Superintendent Hunter recommended that they "should be acted upon by the tribal council adding to the current membership roll." (Exhibit #82)

In a letter from Superintendent Hunter to Ms. Charlene Miller, dated December 13, 1990, the BIA once again referred to the incompleteness of the "list of 17" used by the Interim Council and later by Chairman Glenn Wasson and his newly elected Council. The Superintendent addressed Ms. Miller's concerns that five applicants from the George family, hers included, had been rejected unfairly. The Superintendent wrote: "Because I have advised the tribal council that I verified the eligibility of the five (5) individuals named in my October 11, 1990 letter, the tribal council should act on those applications in the same manner as the other seventeen (17) and place your names on the certified roll." The WIC Council received a copy of this letter.

In 1998, a membership roll consisting of seventy-seven (77) names was brought into the Western Nevada Agency by then WIC Chairman Glenn Wasson. According to Superintendent Hunter, in his letter

to the Western Regional Director in Phoenix dated April 23, 2001, "there was no support documentation to prove that the requirements of Article II of the Tribal Constitution were met." In the BIA's opinion, despite attempts to resolve its membership issues, the WIC still had not succeeded by 1998 to satisfactorily address its membership issues.

At the March 22, 2000 Tribal Council meeting that followed Chairman Glenn Wasson's death, the need to establish a valid tribal enrollment list was once again raised and addressed. BIA Tribal Operations Director Fred Drye was in attendance once again urging, that this question be resolved prior to filling the vacant position of Tribal Chairman. In the presence of members of the Western Nevada Agency, the WIC Tribal Council agreed with the BIA's assessment and created an enrollment committee that was assigned to review applications and make recommendations to the WIC Tribal Council. Resolution WN00-05 (Exhibit #38a) read: "The Winnemucca Tribal Council has determined that there is a need to establish a new membership list, review, up-date, and suggest modifications to the current Enrollment Ordinance." The new Enrollment Committee was composed of ~~Merle~~ [Myrl] Ayer, Charlene Dressler, Kathy Nez, Barbara Mills and Thomas Magiera.

The breakaway Sharon Wasson Council quickly repudiated the process outlined by the official Tribal Council at its March 22, 2000. The group ignored resolutions its own members had initiated and approved earlier at the Council meeting, in front of

thirty-nine tribal members. They boycotted the new Enrollment Committee and appointed Sharon Wasson to fill the vacancy before an enrollment list was established and approved. After that, both the Sharon Wasson group and Acting Chairman Bill's Interim Council established their own enrollment lists as they prepared for elections they held respectively on October 28, 200 and April 28, 2001.

FINDINGS

1. At this time, the WIC has no established agreed upon Enrollment List that can serve as the basis for an Eligible Voter List.

2. The "list of 17" names is and always has been incomplete. At best, it is a starting point for establishing a complete and longer list of people who meet the WIC Constitutional criteria for membership.

3. The "list of 77" that the Wasson group has from time to time maintained is the WIC Enrollment list contains people for whom there is only incomplete information.

4. The list that Acting Chairperson William Bills' Interim Council developed prior to its April 28 election also lacks certain supportive and conclusive data, specifically because the other tribal faction, the Sharon Wasson group, did not submit enrollment applications and the needed documentation to go with it.

B. Who has the authority to establish a WIC Enrollment List?

Given that today there is no agreed upon WIC Enrollment List, who has the authority to create such an Enrollment List? Normally the answer is quite straightforward. In the words of the Area Director of the BIA Regional Office in Phoenix, in his Memorandum to Superintendent Hunter of the Western Nevada Agency, dated June 23, 1986, "the courts have consistently recognized that Indian tribes' most basic power is the authority to determine its own membership. According to Article II *Membership.* Section.3 of the WIC Constitution and Bylaws, "the Winnemucca Colony Council shall have the power to enact ordinances . . . governing the procedures to be followed when a member becomes ineligible for continued membership, when a person wishes to be adopted into membership, and when an eligible member requests to be officially enrolled." The WIC Enrollment Ordinance #310 spells out application, review, approval and appeal procedures.

Although the Tribal Council has the primary responsibility for determining membership, the WIC Constitution recognizes that the WIC Tribal Court is also a forum in which membership can be determined. When an applicant for membership believes the Tribal Council has not or cannot fulfill its role as an impartial objective decider, he/she can take the case to a higher level and appeal to the Tribal Court. According to the Enrollment Ordinance #310, a dissatisfied applicant can appeal "to the appropriate

Tribal Court . . . and through any appellate courts as appropriate within the judicial rights provided by those courts."

Under normal conditions, according to the WIC Tribal Constitution, it is the WIC Tribal Council, and its Enrollment Committee, that has the authority to determine who its members are and, once that is done, the authority to conduct tribal elections to ensure an orderly transfer of power to a new leadership every two years. However, today there is no enrollment list nor is there a legitimate tribal council to create one. What is to be done in these circumstances?

FINDINGS

1. Currently there is no established WIC Enrollment List that can be used at this time.

2. In the absence of an established Enrollment List and a tribal council that would otherwise establish such a List, this Court finds itself having to facilitate both the construction of a list and the conduct of an impartial and fair tribal council election.

3. This Court's authority to conduct an impartial and fair tribal council election, certify the results, and swear in the newly elected tribal council members rests on an agreement by both the defendants and the plaintiffs to have this Court serve in this role.

4. This Court's authority to create an official Enrollment List derives from specific instructions given to this Court by the Intertribal Court of Appeals of Nevada to determine "the names of the members of the Winnemucca Indian Colony who are eligible for enrollment". The fact that the defendants and the plaintiffs jointly selected the *pro tem* Judge to rule on this and the two other matters identified by the Appeals Court, makes this Court the only tribal governmental institution operating at this time that has been endorsed by both the defendants and the plaintiffs.

5. Placing the Tribal Court in the role of facilitating the construction of the WIC Enrollment List is in keeping with the enrollment process laid out by the WIC Constitution and the WIC Enrollment Ordinance.

6. The Winnemucca Colony is currently in the "judicial appeal stage" of the enrollment process – after earlier stages of extensive data gathering, review and deliberations by various enrollment committees and elected Tribal Councils. Beginning on March 22, 2000, when the last bona fide Tribal Council met, an Enrollment Committee was appointed with Charlene Dressler as its Chairperson. The work of this Committee extended into Acting Chairman Bill's Interim Council up to the time of the April 28, 2001 Tribal Council Election, and afterwards on behalf of its successor Council with Alan Ambler as its new Chairperson and Charlene Dressler as its

Vice Chairperson. In addition, the Sharon Wasson "Council", and its successor Council elected on October 28, 2000 led by newly elected Chairperson Thomas Magiera, generated and approved additional applications for enrollment along, with supportive data of its own.

7. This Court took extensive testimony regarding enrollment eligibility from witnesses representing both Mr. Magiera's and Mr. Ambler's tribal councils. Both sides had the opportunity to provide documentation to justify acceptance and rejection of an array of persons who have applied for enrollment. In addition to taking formal testimony, this Court set aside an entire day on March 11, 2002 to facilitate settlement discussions and to explore grounds for reaching an agreement on an enrollment list. These discussions fully represented a cross-section of interests within the WIC community.

8. After all these attempts by tribal representatives to resolve the enrollment questions by themselves, they were unable to do so. Consequently, this Court finds that if it does not adjudicate questions of enrollment eligibility, they will not be settled and there will be no WIC election held that is widely recognized as legitimate.

9. This Court rejects the defendants' position regarding how an enrollment list should be prepared at this time. Arguing that only a WIC Tribal Council can do this, they suggest

having two consecutive elections. The first would be based on a preexisting "list of 17" eligible tribal members created in 1989 and 1990. According to the defendants, the Tribal Council created by this election would consider updating and expanding the enrollment list for yet a subsequent election to be conducted in October 2002.

10. There are two major problems with this proposal. The "list of 17" was always incomplete and did not truly reflect the information available at the time. In addition, the incomplete "list of 17" is made up of the defendants and their supporters. Relying on them to create a new government would predictably lead once again to a government dominated by one family and the exclusion from the rolls of others who are qualified to participate in WIC government activities. The Court agrees with the defendants that a list is required before an election but does not agree with the list they propose.

11. Below, is presented the "Winnemucca Indian Colony Tribal Enrollment List – May 2002", established by this Court after a lengthy and thorough review of all testimony, applications and supportive data provided by the plaintiffs and defendants. The list is presented below as an integral part of this Court's decision and shall be binding.

12. Directly before presenting the new list, the Court examines the historical backgrounds of four major families whose lineage and

blood quantums have been points of contention for many years in the Winnemucca Colony. Discussed in this section is the evidence submitted by the defendants and the plaintiffs, as well as the facts established and the conclusions reached by this Court regarding these heretofore unresolved enrollment questions.

C. An analysis and resolution of four WIC families' eligibility for enrollment.

The evidence submitted to the Court pertaining to the issue of eligibility for WIC enrollment is evaluated against the criteria established by the WIC Constitution and By-laws. According to the WIC Constitution, Article II Membership, *Section 1*, "the membership of the colony shall include all persons of at least one-fourth (1/4) degree Paiute and/or Shoshone Indian blood who meet the following requirement: their names appear, or they are descendants of persons whose names appear, on the December 9, 1916 census of the Winnemucca Shoshone Indians. The degree of Indian blood of all persons listed on the 1916 roll will be determined from information contained in the records of the Nevada Agency. According to *Section 2.* "No person shall be eligible for membership in the Winnemucca Indian Colony who has received land or money as a result of having been enrolled as a member of some other tribe, band or community of Indians."

1. The Vivian Leyva/Linda Ayer Family.

The Ayer and Leyva families have periodically applied over the years for membership in the Winnemucca Indian Colony. They trace their descendency through Sally Cinnabar aka Sally Toy or Toi who appears on the 1916 base roll.

The defendants have denied these two extended families WIC membership on the grounds that Sally Cinnabar's name did not appear on the 1916 base census roll. At the same time, in their testimony before this Court, they readily acknowledge that Sally Cinnabar was always recognized as a tribal member and lived in the Winnemucca Colony for over thirty years. The defendants also acknowledge that Sally Cinnabar voted as a tribal member in the 1935 tribal election that established the tribal constitution under the Indian Reorganization Act, and that a street on the Colony was named after Ms. Cinnabar.

The primary disagreement is over whether Sally Cinnabar was Sally Toi who appeared on the 1916 census. The defendants contend that these were two different people although they offered no substantial evidence. The plaintiffs maintain that Sally Cinnabar and Sally Toi are the same person. They point out that Sally Toi appeared only once on the record while Sally Cinnabar appeared on the census rolls before and after 1916, including in 1910, 1920, and 1930. Moreover, they point out that no census records list both names at the same time, suggesting that both names would likely be listed if they were contemporaries instead of the same person.

Furthermore, they point out that the census records list Sally Cinnabar and Sally Toi as being of a very similar age. Sally Cinnabar's DOB was in 1864 according to all the census rolls submitted into evidence. Sally Toi is shown on the 1916 roll to have been born in 1866. Given that these census rolls are notoriously inconsistent regarding dates of birth and ages, as well as other information, they suggest that this closeness in age supports the proposition that the two Sallys were really the same person. Finally, whereas the defendants allege that Sally Toi died "around 1925" there is no evidence of such a person's death. There is no death certificate or evidence of a gravesite presented into evidence. On the other hand, there is a Death Certificate dated September 24, 1936 for Sally Cinnabar and evidence of a gravesite and tombstone.

According to the 1910 census roll, Sally Cinnabar was married to Bill Cinnabar (exhibit #97). Lizzie was one of their children. She married Ike Winap and had a daughter Irene, who become the mother of Carolyn Leyva Ayer.

This Court finds that the Sally Toi on the 1916 census roll was in fact Sally Cinnabar by a different name, and that the Ayer and Leyva families who trace their direct lineage back to Sally Cinnabar meet the descendency requirements for WIC enrollment.

2. The Charlene/George Family.

The Dressler/George family (Charlene Dressler, Gordon George and Clorinda George and

descendents) also has been denied membership in the WIC over the years each time it members submitted enrollment applications for consideration and approval.

Already mentioned above, Charlene Dressler and family members were found to be eligible for membership by the Western Nevada Agency of the BIA over twelve years ago in 1989-1990. At that time, the Tribe was reconstituting itself in response to the BIAs decision in 1986 to no longer recognize the WIC Tribal Council as "functional". Charlene Dressler was designated by the BIA as one of twelve people who could trace her blood relatives back to the 1916 base roll and thus participate in forming, an interim government that would organize a new government and elect new leaders. According to correspondence from the BIA, the Interim Council, when it was preparing, for the election of a regular Tribal Council, "improperly" left Ms. Dressler and her family off the "list of 17" it deemed eligible to vote (Exhibit #58).

The defendants and related family members have opposed approving the George family's application for membership for reasons that have varied over the years.

Before 1990, they argued that Charlene Dressler was ineligible because she was a recipient of Northern Paiute Judgement money (Docket 87). The BIA eventually established that this was not grounds for disqualification because "the Northern Paiute payment was based on descendency. It was not a tribal payment. As such, it should not

be used as a basis for denying membership in the Winnemucca Colony if a person shared in that distribution." (letter to Charlene Miller on December 30, 1990 from Superintendent Hunter. Copy sent to Glenn Wasson, Tribal Chairperson. Exhibit #58.)

The Dressler/George family traces its descendency through Harry Oppenhiem and his wife Lottie, back to Harry's father Johnny Oppenhiem who appears on the 1916 census roll along with his wife Minnie. The defendants have argued that there was no such father-son relationship, maintaining that Johnny Oppenhiem was born in 1860, and Harry was born in 1871 according to the Lovelock census in 1911, 1912, 1928 and 1929.

The plaintiffs produced a 1910 census that eliminates the guesswork and directly establishes the relationship of father and son. It shows that in 1910 Johnny Oppenheim was 45 and his wife Minnie was 38. Listed directly below is Harry, designated explicitly as Johnny's 24 year old son, and Harry's wife Lottie who is listed as 22 years old that same year. This information is not from a BIA census but rather from the thirteenth Census-Indian population from the Department of the Census. It was taken on May 5, 1910 of persons living in the Winnemucca precinct as of April 15, 1910. None of the other census rolls submitted into evidence by the defendants or the plaintiffs list both Harry and Johnny at the same time. Johnny appears on the Winnemucca rolls while Harry appears on the

> Lovelock rolls, implying perhaps that Harry and his wife moved to Lovelock after they got married while Johnny and his wife and their other children remained in Winnemucca.

The plaintiffs submitted additional evidence to document that there was a sufficient age spread to show the father/son relationship. According to the Lovelock census rolls in 1931, Harry Oppenheim is 46 and in 1934 he is 49, implying that he was born in 1885. Additionally, the 1937 Non-Reservation Indian Census Roll gives Harry's age as 55. This would have him born in 1882. All this is consistent with the family tree that the BIA drew for Charlene Dressler showing, Johnny as Harry's father.

More recently, the defendants challenged the Dressler/George families' applications for WIC membership on the grounds that Charlene Dressler's grandmother, Marjorie Oppenhiem, was not really an Oppenhiem. They maintained that Marjorie's biological father was a Mr. James Hunter, a white Deputy Sheriff in Lovelock, rather than Harry Oppenhiem, thereby interrupting the blood line back to Johnny Oppenhiem who appears on the 1916 roll. The defendants point to the Lovelock Tribe's census rolls in 1931 and 1934 that list Marjorie as Marjorie Hunter.

The defendants submitted an affidavit from Marjorie Dupee, formerly Marjorie Oppenhiem and Hunter, dated March 8, 2002, claiming that her real biological father was James Hunter not Harry Oppenhiem to whom her mother was formerly married. In the

affidavit, she refers to Harry Oppenhiem as her stepfather and to her mother as Lottie Dave, her mother's maiden name (Exhibit #101).

It is difficult to assess the reliability of the information provided in this affidavit. Ms. Dupee was not available to testify or be cross-examined. Moreover, she gives no source for her information nor does she provide other information or documentation regarding her family's history. At best, she is relying on her recollection of stories told to her by others a long time ago. According to testimony given by the plaintiffs, Ms. Dupee has severed her relationship with her daughter and granddaughter (Charlene Dressler), and knows that they have applied to WIC based on their descendency to Johnny Oppenhiem. It is hard to know whether Ms Dupee's affidavit is punitive in intent. There also seems to be inconsistency over the years in how she calls herself. For example, as late as July 15, 1984, when Charlene's father and Marjorie's son, Gordon George, died, Marjorie's maiden name is listed on his Death Certificate as Marjorie Oppenhiem not Marjorie Hunter.

The plaintiffs offer evidence that raises questions about the validity of the defendants' conclusion that Harry Oppenhiem was not Marjorie's biological father. Marjorie was born in 1919. Nine years before Marjorie's birth, in the Lovelock 1910 census, Harry and Lottie Oppenhiem are listed as husband and wife. Ten years after her birth, in the Lovelock census rolls in 1928 and 1929, they are still listed as husband and wife. According, to these records, Harry and

Lottie seem to have lived together as a family for at least nineteen years, and perhaps many more. During this time, they had three other children in 1908, 1909, and 1914. This information would imply a fairly stable marriage relationship during this period.

There is another point to consider, Marjorie was listed as Marjorie Oppenhiem year after year in the census rolls until the 1931 census. Only when she was twelve years old, was she referred to as Marjorie Hunter. Why did the change in name occur only when she was twelve? Was it discovered only then that Hunter instead of Oppenhiem was her biological father? Or, alternatively, perhaps Lottie and Mr. Hunter never were a couple and never had a child together. After all, Marjorie's mother, Lottie, never appears to have changed her name to Hunter, appearing in the census rolls consistently as Lottie Oppenhiem.

Given the very inconclusive evidence available, it seems just as possible that Marjorie acquired the name Hunter for a different reason. Mr. James Hunter might have adopted the Oppenhiem's youngest daughter, Marjorie, and given her his name when for some reason her parents could no longer take care of her. There is evidence that there were some significant changes in the status of this Oppenhiem family around this time. The 1937 Indian Census Roll for the Non-Reservation Paiute Area listed Harry Oppenhiem as "blind" already at 55 years old. It is not clear how long he had been living with this affliction. Does this mean that Harry became too infirm or

incapacitated to care for all his children? In addition, Lottie is shown on the 1931 census rolls as a "widow" and head of household with Harry marked off as a "relative". It was in 1931 that Marjorie first became listed as a Hunter. Her parents may well have separated at this time. Her mother Lottie apparently died a few years later at a fairly young age, around 46. She too may have been ill around the time when her youngest daughter, Marjorie, became a Hunter.

The only interpretation of this mystery that would jeopardize the application for WIC membership of Charlene Dressler and other members of her family is if it can be shown that Mr. Hunter was Marjorie's biological father. In the opinion of this Court, the evidence is not "clear and convincing" which is the standard under the law that needs to be met to overrule the presumption of legitimacy of a child born in wedlock. Nevada State law applies according to the WIC Law and Order Code. NRS 126.051(1), which applies to issues of heirship and all persons no matter when born, lists five presumptions of paternity, four of which logically apply to this case and weigh in support of Harry Oppenhiem being Marjorie's father and thus Charlene Dressler's heir. Those presumptions are: (a) birth during marriage; (b) cohabitation before and through the period of conception; (3) attempted marriage before the child's birth; (d) receiving the child into the father's home and openly holding the child out as his own. The fifth presumption -- the existence of blood tests or genetic tests –

were not available to verify paternity at the time of Marjorie's birth (1919) and childhood.

Nevada state law, NRS 126.071, restricts who may bring a paternity action, limiting it to "a child, his natural mother, a man presumed or alleged to be his/her father, or an interested third party." An interested third party can only be someone seeking the best interests of the child. It is the opinion of this Court, that no one involved in this lawsuit has standing to challenge presumption of paternity. None of the biological claimants have brought an action, and it could hardly be said that the defendants have the best interests of the child in mind, in this case, the interests of Charlene Dressler and members of her family.

In sum, this Court finds that no evidence provided by the defendants defeats the claim for WIC membership submitted by Charlene Dressler and members of her family. The latter meet the descendency requirements for WIC enrollment.

3. The Elverine Murphy Castro/Mageira Family

The Magiera family traces its lineage through Elverine Murphy Castro (83), to Elverine's mother Jessie Dave who was the daughter of Gertie Austin, also known as Gertie Toitoi, who was on the 1916 census roll. The main question today is whether Elverine Castro's blood quantum is 4/4 or ¾. The answer bears directly on whether her grandchildren

meet the WIC blood quantum requirement of ¼ Paiute and/or Shoshone and thus are still eligible to be tribal members.

The defendants maintain today that Elverine Murphy Castro is 4/4 Indian blood and the plaintiffs maintain that at the very most she is ¾. The truth of the matter should be revealed in the information provided about Elverine's father, Dick Murphy. We know that her mother, Jessie Dave, was a full-blooded Indian woman, but what about her father? Unfortunately, there is very little definitive information about Dick Murphy. Was he a white man, ½ Shoshone, or a full-blooded Shoshone? The old stories have contained all these conflicting versions of his heritage. Moreover, it is generally believed that Dick Murphy was adopted, lived with many different families during his childhood, and may have known very little about his own ancestry.

Apart from the folklore around Dick Murphy, what do the official records reveal? There are no census rolls submitted in evidence that list Dick Murphy. There are only indirect references to him. On the April 1, 1930 Indian census roll (exhibit #95) Elverine Murphy is shown as having a full degree of Indian blood. However, all the other names on the 1930 list show 4/4 also In contrast, where she is listed on the 1940 census for the Non-Reservation Paiute Area of Pershing County as the married wife of a white man, Walter Magiera, she is shown as having ¾ blood. Elverine's full sister, Frances, is also listed as ¾ blood on the same census roll. On the Lovelock Indian

census rolls for April 1, 1931 and 1934, Elverine and Frances Murphy are also listed as ¾ blood. In fact, more detail is shown on the 1931 census with Elverine and Frances being shown as ¼ Paiute and ½ Shoshone.

There is yet another set of documents (Exhibit #105) that speak to Elverine's blood quantum, her own enrollment application to the Te-Moak Tribe and her certifications as a Te-Moak tribal member. On the official Te-Moak application she sent to the Tribe on March 3, 1981, she indicated that she was ¾ total Indian blood and ¾ degree of Shoshone blood. As important, she indicated that her father, Dick Murphy, was ½ Shoshone blood. The Te-Moak Enrollment Resolution No. 83-TM-07 (dated 12-17-83) officially enrolled Elverine (Murphy) Castro as having ¾ total Indian blood. Presumably, the Te-Moak Tribe conducted independent research on its own to verify the information Ms. Castro provided with her application.

It is the conclusion of this Court that available evidence at best supports the position that Elverine Castro is ¾ Indian. The conclusion that she is ¾ rather than 4/4 is based on the fact that this is what she personally reported on her application to the Te-Moak Tribe twenty years ago. She explicitly lists her father as ½ Indian blood, which can be translated only as her having a maximum of ¾ Indian blood. We are taking her word for it even though there is no hard data that Dick Murphy was ½ Indian. Equally compelling is the corroborating evidence of census

rolls that quite consistently show Elverine and her sister to be ¾ Indian blood.

This Court's conclusion of fact leaves Mr. Thomas Magiera and his two sisters as the last generation of that family entitled to membership under the Tribe's current criteria. Unless or until the Tribe amends its Constitution regarding the ¼ blood quantum requirement, all Elverine Castros grandchildren who are at 3/8 [3/16] do not qualify for WIC membership.

4. The Glenn and Sharon Wasson Family

Similar to the situation with Elverine Murphy Castro and her family, no one has directly challenged the fact that Glen and Sharon Wasson and family can trace their lineage back to Thomas Wasson who appeared on the WIC 1916 base roll. The point of contention is blood quantum and whether Glenn and Sharon Wasson, sons of Thomas Wasson and Sadie Dyer, are 4/4 or 7/8 Paiute and/or Shoshone.

Recently, the defendants presented into evidence a family tree prepared apparently by the Northern Idaho BIA Agency showing Glenn Wasson as 4/4 Paiute/Shoshone. This is the first evidence of its kind and not accompanied by census rolls or other documentation. More on point perhaps is the fact that on Sharon Wasson's WIC membership application, dated September 9, 1989, which he presumably filled out by himself, he shows that he is 7/8 Paiute/Shoshone. In addition, Thomas Wasson, Sharon Wasson's son, filled out his WIC application indicating also that his

father is 7/8 total Indian blood. Sharon Wasson's full brother, Glenn Wasson, is purported to also have represented himself as 7/8 Indian blood. However, no application or support information was submitted into evidence for Glenn. Since he is deceased, it is difficult to pursue the question of the bothers' blood quantum much beyond this point.

Appearing to support the Court's conclusion that the Wasson brothers, Glenn and Sharon, are 7/8 Paiute/ Shoshone, is the fact that Thomas Magiera submitted into evidence a "Revised List of 77" to this Court, with a cover letter dated December 10, 2001. The difference between it and the original list prepared in 1998 was that it left out, for a variety of reasons, a number of the people whose names appeared earlier. The Wasson grandchildren were among those left off quite likely for the same reason the plaintiffs have challenged their previous inclusion. They do not meet the Tribe's current ¼ blood quantum requirement. In Mr. Magiera's own words: "the numbered (empty) spaces represent persons who are deceased, removed and those whose eligibility needs more credible documentation or for Constitutional changes to be made." (December 19, 2001 cover letter)

As time goes on, fewer and fewer of the WIC tribal members' children can meet the existing blood quantum requirement. Once there is a functioning WIC tribal government in place, it can be expected to revisit and amend the tribe's Constitutional blood quantum requirements and find a objective and legal way to qualify Elverine Castro's, Glenn and Sharon

Wasson's, and other people's grandchildren as WIC members.

d. The Official Winnemucca Indian Colony Tribal Enrollment List – May 2002

Below, is presented a list of 106 names. The first seventy-seven (77) names are from the defendants' "list of 77" compiled in 1998 and composed of people who the Tribal Council at that time proposed were potentially eligible for membership. The next eight (8) names listed are of people who were added to that "list of 77" in recent months by the defendants. Finally, there are twenty (20) more names listed of people who the plaintiffs have maintained are also eligible for enrollment.

Forty-nine (49) people from the list of one hundred and six (106) are deemed by this Court to currently meet the enrollment requirements laid out in the WIC Constitution and Enrollment Ordinance. They have been placed on the **Official Winnemucca Indian Colony Tribal Enrollment List,** established in May 2002 by this Tribal Court. All persons who are 21 years or older on this list shall comprise the Eligible Voters List and shall be considered qualified to vote in the upcoming Tribal Council Election.

[The Winnemucca Indian Colony
Tribal Enrollment List Omitted In Printing]

NOTES

Note 0

These blood quantum figures reflect only the blood that applies for Winnemucca Indian Colony membership. Total Indian blood of the individual may actually be higher.

Note 1

Significance of the abbreviations used in this document:

Y – Application presently in court file of this case

Y 1 – Application presented 3/24/02

N – No application submitted into evidence in these proceedings

FT – No application but Family Tree provided 3/24/02

Note 2

The first item of information listed horizontally is always an indication of how the individual's lineage is traced to 1916 Census base roll.

Note 3

Sally Toy = Sally Cinnabar (similar birth dates). Sally Toy and Sally Cinnabar never appear together on any census, suggesting two names for the same person. In fact, the only census roll in evidence showing Sally Toy at all is the 1916 base roll census. The application

is also supported by old newspaper articles, Death Certificates, and photos. Sally Cinnabar is acknowledged by the defendants as one of the original residents, is on voter's list for 1935 to create Tribe, and is on many census rolls.

Note 4

The Magiera Family: Elverine Castro and 4 of her children (#'s 3, 4, 10, 24) and 16 of her grandchildren (#'s 2, 5, 6, 11, 22, 25, 26, 59, 60, 61, 62, 78, 80, 81, 82, 83) claim to be descended from Gertie Austin. There are some records that show Elverine Castro as Jessie Dave's daughter but there are no records to show that Jessie Dave was related to Gertie Austin. Putting that aside, the primary problem is that Elverine Castro cannot prove more than ¾ blood quantum. Records show her mother, Jessie Dave as 4/4 but there is no record anywhere of her father's blood quantum. Over the years, he has been consistently counted as ½, making Elverine ¾. Several detailed Census rolls show this number. Te-Moak records show that Elverine herself indicates that she was ¾ Indian blood and that her father was ½ Indian blood (Shoshone).

Note 5

Tom, Richard Patrick: 1989 BIA records show Mr. Tom as 13/16 and a grandson to Pete Brady #71 on the 1916 Census. However, his original 1989 Application Family Tree is completely unreadable. Tom

Mageira made him one on 12/5/01, which is incomplete. Most importantly, in 1998 or 1999, immediately after being elected to the Colony Council, he resigned the position and disenrolled himself so he could remain enrolled at Te-Moak. He should not be listed as "enrolled" without his written consent.

Note 6

Thomas Wasson who is listed here is the son of Sharon Wasson #14. Evidence submitted by defendants and plaintiffs shows that both Thomas and Sharon list Sharon's blood quantum as 7/8 on Sharon's WIC application for enrollment submitted in 1989. This Court finds that such evidence is more compelling than contradictory evidence that may be found elsewhere. Glenn Wasson, now deceased, was Sharon's full brother. He too considered himself 7/8. Alyce Wasson William's (#17) is their full sister and should be at 7/8 also. All their descendants should be computed on the basis of 7/8.

Note 7

Gertie Austin #56 on 1916 Census is widely thought to be the mother of Jessie Dave though that relationship is not shown on any census submitted into evidence. Jessie Dave had children with 2 men. The first 2 children are with Dick Murphy, one of whom was Elverine Murphy Magiera Castro; the other was her full sister Frances. See Note 4. Jessie had 5 additional children with Willis Lyman Evans. Since

Mr. Evans was Pit River, he is not given credit with any blood that counts for WIC.

Note 8

People listed here from #63-69 are Glenn Wasson's grandchildren. Their blood quantums should be computed on the basis of Glenn 7/8-blood quantum. See note #6. No applications were submitted into evidence for #63-69: although the court requested them on March 11, 2002. Family trees were submitted in November 2001 for the Fortin girls #66-69. More family information was submitted on all seven grandchildren at the March 24, 2002 hearing. At 7/32 blood quantum, they are not eligible to enroll under current WIC membership eligibility criteria. Furthermore, this Court has no applications for 63-69, which is a requirement of the Enrollment Ordinance. Finally, without a signed application submitted by the applicant, we do not know whether they want to be enrolled at this time and whether WIC enrollment might jeopardize their enrollment in another tribe.

Note 9

Michell Scholar claims to be of ¼ blood descended from Mabel Sue #34 on the 1916 Census. In January 2002, he contacted the Mageira group about enrollment. In January 2002, the Mageira group wrote a letter for him about probable eligibility and in February 2002, passed a resolution enrolling him, which recited that Mitchell had submitted an Application,

Family Tree and other documents. The letter and the resolution are part of a 2/25/02 letter to this Court. No application was received into evidence.

Note 10

The Family Trees for the persons listed here as #35, 36, 37 and 72 have blood quantums of 3/8. The defendants have suggested that it be ¼ rather than 3/8 on the "Revised List of 77" presented to the court by Thomas Magiera on December 8, 2001. However, no evidence was submitted to challenge the 3/8 amounts shown by the applicants.

Note 11

Defendants have alleged that William Bills (#38 on this list) has no Indian blood and therefore, does not meet WIC enrollment criteria. Unfortunately, this Court does not have enough information to decide this issue. Mr. Bill's eligibility was not a significant focus of the proceedings. Since there is a question about whether Mr. Bills actually wants to be considered for enrollment, the Court has decided not to include him at this point and has put him in "pending" status until Mr. Bills himself directs the WIC Council to act on his application.

Note 12

Bill, Melanie Lynn, unlike her brother William Bills (#38 on this list) is the undisputed daughter of Ermon

Bills (#40 on this list) and so her blood and membership is uncontested.

Note 13

A number of people have submitted some of their information but have not submitted an application in evidence. The Enrollment Ordinance requires that an application be submitted as part of the process, and, to the extent applicants are missing one, they are out of compliance. In addition to the "technical" reason for not placing them on the "Enrollment List 2002" at this time, there is a very practical reason. Without a signed application there can be no assurance that the person in question wants to be considered. Among other reasons for possible reluctance would be disenrollment by another tribe that prohibits dual enrollment. People without applications who have submitted some information are given a "pending" status.

COURT ORDER

1. The **Official Winnemucca Indian Colony Tribal Enrollment List,** established by this Tribal Court shall be binding and used as the basis for composing an Eligible Voters List for the upcoming Tribal Council Election. Anyone who is 21 years old or older on the Enrollment List of 49 people shall be eligible to vote.

2. A Tribal Council Election shall be organized and conducted no later than October 30, 2002, and shall allow a full three months prior to election day to implement the election schedule. For example, if the election day is scheduled for October 20th, the election announcement along with a description of the election process that will be followed shall be sent by mail to all eligible voters by July 19, 2002.

3. A WIC Tribal Election Committee shall be formed immediately. It shall be composed of two enrolled WIC members selected by the plaintiffs and two enrolled WIC members selected by the defendants. The **Official Winnemucca Indian Colony Tribal Enrollment List** shall be the guiding document as to who is an enrolled member. Charlene Dressler shall be the fifth member of the WIC Tribal Election Committee and shall serve as the Committee Chairperson. She shall have a vote on the Committee. Her serving as the Committee Chairperson shall not disqualify her from running as a candidate in the upcoming Tribal Council Election.

4. The plaintiffs and the defendants have agreed that Indian Dispute Resolution Services, Inc, a national non-profit Indian organization that specializes in conducting tribal elections, will conduct the WIC Tribal Council Election under contract with the Tribe. In its role as an impartial third party, IDRS will have the responsibility of ensuring that the election is administered in an open,

impartial and objective manner, there is the fullest possible participation by eligible voters, and the sanctity of an impartial democratic election is protected.

5. The Tribal Election Committee, as described in #3 above, shall meet with the IDRS election monitors in the presence of the current presiding judge of the WIC Tribal Court. It shall develop and endorse a detailed "Elections Procedures Agreement" that will direct IDRS how the election should be implemented.

6. The WIC Election Ordinance will serve as a guide for the conduct of the Tribal Council Election. Yet because the Ordinance is silent on some procedural matters of significance, the Election Committee will exercise its delegated authority to resolve these issues by incorporating greater detail in the Elections Procedures Agreement.

7. The Elections Procedures Agreement will address and resolve such issues as: process and schedule for noticing all eligible voters; deadlines, requirements and forms for declaring candidacy; procedures for verifying that candidates for office meet established criteria; conducting background checks; a process and forms for requesting and receiving absentee ballots; procedures for casting absentee ballots; criteria for disqualifying ballots; guidelines for election observers; procedures for counting ballots; etc. IDRS election monitors will facilitate the

discussions and assist the five members of the Elections Committee reach agreement on elections procedural issues.

8. The Elections Committee will conduct its business by first attempting to resolve the election's procedural and other issues by consensus. In the event consensus is not possible, the Committee will reach decisions by majority vote.

9. Before July 2002, the Elections Committee will establish a complete list of names, current addresses, and phone numbers (if applicable) of all persons on the Eligible Voters list. This will enable the Committee and IDRS to be in contact with eligible voters by mail to ensure their fullest possible participation in this important tribal election.

10. This Court shall maintain jurisdiction over the Winnemucca Indian Colony until after there has been a proper Tribal Council Election that fully complies with the requirements listed above and this Court has sworn in the newly elected Tribal Council members.

SO ORDERED this 9th day of May, 2002

/s/ Steven Haberfeld
Steven Haberfeld, *pro tem* Tribal Court
Judge of the Winnemucca Indian Colony

IN THE WINNEMUCCA TRIBAL COURT IN AND FOR THE WINNEMUCCA INDIAN COLONY, WINNEMUCCA, HUMBOLDT COUNTY, NEVADA

WILLIAM BILLS,
Acting Tribal Chairman for
WINNEMUCCA INDIAN
COLONY and et al.,

Plaintiffs,

vs.

SHARON WASSON,
LUCY (WASSON) LOWREY,
ELVERINE CASTRO, AND
THOMAS WASSON (aka
BUSINESS COUNCIL OF
THE WESTERN BAND OF
THE WESTERN SHOSHONE),
all individually and in their
capacity as Council Members
of the Winnemucca Colony
Council and DOES 1-100,

Defendants.
_____/

Case No. CV-1003

ORDER FOR PERMANENT INJUNCTIVE RELIEF AND RESTRAINING ORDER

(Filed Jan. 18, 2001)

This matter came before this Court on July 31, 2000, having been continued from a hearing held on June 14, 2000. The hearing on this date was scheduled on Plaintiffs AMENDED MOTION FOR INJUNCTIVE RELIEF to determine whether the Order dated April 17th, 2000, shall be extended or become permanent and on Plaintiffs EX-PARTE MOTION FOR ORDER FOR DEFENDANT'S TO SHOW

CAUSE WHY DEFENDANT'S SHOULD NOT BE FOUND IN CONTEMPT OF COURT FOR FAILURE TO OBEY A LAWFUL ORDER OF THIS COURT. Plaintiffs sought relief, inter alia, from Defendants' actions, which Plaintiff claims were improperly entered into, acting under color of the "Western Band of Western Shoshone" – Winnemucca Tribal Council and which is not a Federally Recognized Indian Tribe and without the necessary recognition of the Bureau of Indian Affairs. Present in Court were Plaintiff, WILLIAM BILLS, Chairman, Winnemucca Indian Colony, CHARLENE F. DRESSLER, Advocate and ALLEN AMBLER, Representative, for Plaintiffs. Defendants and their Advocate were not present in Court this date, but were present with their Court Advocate, Glen Hardin, during the hearing held on June 14, 2000.

On June 14, 2000, defendants through their Advocate Glen Hardin informed this court that they would be presenting a defense in this matter at a continued hearing date. This Court requested Advocates to contact the Honorable Judge Swanson's office to inform him of available dates for a continued hearing session. Plaintiff's Advocate contacted this Judge and complied with this Court's request. Defendant's Advocate, Glen Hardin and their Attorney, Treva Hearne first requested time for Glen Hardin to take care of personal and medical issues before they could give this court an available date and then failed to respond after this Court initiated contact with

Advocate Hardin and Treva Hearne, Attorney, requesting a response.

Finally, on or about July 12th, Treva Hearne, Attorney for defendants informed this Judge that he did not have a contract to provide judicial services to the Winnemucca Indian Tribe. This Judge requested from Ms. Hearne all evidence substantiating her allegation. Defendants attempted to create their own tribal court, allegedly replacing the recognized Winnemucca Tribal Court, sitting in Winnemucca, Nevada.

Plaintiff's Advocates informed this Judge that they received two "Notice of Hearing" from Treva Hearne, Attorney, informing Plaintiffs to appear at a court for the"Western Band of Western Shoshone" – Winnemucca Indian Colony, in Reno, Nevada, at the office of "Progressive Alliance", for a hearing on this case before a Judge appointed by defendants, namely Charles Hartman. Among other issues the court was called upon to decide is whether this court maintains proper jurisdiction and continued authority in these proceedings

On July 31, 2000, at the continued hearing in this matter, this Judge informed Plaintiffs that Ms. Hearnes allegation regarding his status as Judge were in error and that his attempted removal was in violation of the Winnemucca Indian Colony Law & Order Code. Judge Swanson concluded that he was and is a valid Judge to hear this matter on this date. Defendants attempt to seek redress in a forum

created by themselves smacks of a most deplorable attempt to defraud the court. Defendants did not follow legal authority in support of their argument to replace this court. Defendants are also unable to offer an explanation or point to any authority which would allow a court to sit, convene and to assume venue and claim legitimate jurisdiction outside of the exterior boundaries of the Winnemucca Indian Colony. The authority is clear that this Tribe's Court must be located within the exterior boundaries of the Winnemucca Indian Colony. Indeed the only apparent cognizable rationale for Defendants actions is that they are dissatisfied with the outcome justice would produce given the facts presented in the instant case. Justice demands the court remain firm in its integrity and commitment to providing those within the jurisdiction of the tribe with a forum that provides a fair and impartial result to anyone who would seek redress for their grievances. As such this court will not bend to Defendants' extraordinary attempt to pervert justice.

This Court having made the ruling that Judge Swanson was sitting as a lawfully appointed Judge in this matter proceeded with the continued hearing.

There being no defense presented in this matter this Court ordered the following:

FINDINGS OF FACT

1. This Judge and Court has jurisdiction over the matters involving the Winnemucca Indian Colony

Council and is the only Judge and Court to determine matters of the Winnemucca Indian Colony.

2. Defendants made a general appearance before this Court which unequivocally submitted them to the jurisdiction of this Court.

3. That this Court has finds that Plaintiff WILLIAM BILLS is a duly seated and Acting Tribal Chairman of the Winnemucca Indian Colony.

4. The Bureau of Indian Affairs recognizes William Bills as the properly seated and Acting Tribal Chairman of the Winnemucca Indian Colony until such time as an enrollment list and list of eligible voters is approved and certified and a valid election is then held in accordance with the Constitution and Bylaws and the Election Ordinance of this Tribe.

5. As Acting Chairman William Bills maintains proper authority to protect and disburse funds in all bank accounts holding funds by and for the Winnemucca Indian Colony in the interest of the Winnemucca Indian Colony and as Tribal law provides.

6. Defendants have not provided any information regarding the assets of the Tribe and have not provided any information, documents or any assets belonging to the Winnemucca Indian Colony.

7. That the true financial status of the Winnemucca Indian Colony is unknown to Plaintiffs and the assets have not all been identified. Defendants have not provided any information regarding the assets of the Tribe and have not provided any information,

documents or any assets belonging to the Winnemucca Indian Colony.

8. That there are bank accounts with unknown assets that belong to the Winnemucca Indian Colony, specifically, accounts numbered 690040043, 1000157141, and 690064282, as well as additional other accounts at Bank of America.

9. That defendants ELVERINE CASTRO, LUCY (WASSON) LOWERY and THOMAS WASSON (aka BUSINESS COUNCIL OF THE WESTERN BAND OF THE WESTERN SHOSHONE) have information regarding the assets of the Tribe as a result of them having acted in the role of Tribal Council members since October 10, 1998.

10. That defendant SHARON WASSON and defendant THOMAS WASSON have in their possession a 1999 Daewoo automobile, Vehicle Identification Number KLAVA6924XB163704, that they purchased with tribal funds and therefore said vehicle belongs to the Winnemucca Indian Colony and defendants SHARON WASSON and THOMAS WASSON have failed to return this vehicle to WILLIAM BILLS, Acting Tribal Chairman.

12. That defendants SHARON WASSON, THOMAS WASSON and ELVERINE CASTRO, have without proper authority expended funds belonging to the Winnemucca Indian Colony.

13. The Winnemucca Indian Colony does not have an official list of eligible or enrolled members

and until such time as an official list of eligible members is verified by the BIA and certified by the Enrollment Committee, no appointments to fill the vacant Council seats should be approved.

14. That the Tribal Council Election of October, 1998 for the Winnemucca Indian Colony was not held in accordance withe the Winnemucca Tribal Election Ordinance and therefore, defendants THOMAS WASSON, ELVERINE CASTRO and LUCY (WASSON) LOWERY were not lawfully elected and do not officially hold the seats of Tribal Council members.

15. Tribal Council Meetings, that have been declared invalid by the BIA, have been held outside the Geographical and Jurisdictional boundaries of the Winnemucca Indian Colony.

16. The Defendants THOMAS WASSON, ELVERINE CASTRO and LUCY(WASSON) LOWERY are in possession of Tribal Assets and Official Documentation that have not been returned to WILLIAM BILLS and the Winnemucca Indian Colony.

17. Defendant SHARON WASSON is not a duly elected or appointed Tribal Chairman or Tribal Council member of the Winnemucca Indian Colony as a result of being elected or appointed by defendants THOMAS WASSON, ELVERINE CASTRO and LUCY (WASSON) LOWERY at an invalid meeting of the "Western Band of Western Shoshone" which is not the Federally recognized representative governing body of the Winnemucca Indian Colony.

18. That defendant SHARON WASSON is not a duly elected or appointed Tribal Chairman or Tribal Council member as a result of being elected or appointed by defendants THOMAS WASSON, ELVERINE CASTRO and LUCY (WASSON) LOWERY, whom were not lawfully elected or appointed.

19. That defendant ELEVERINE CASTRO had not properly enrolled with the Winnemucca Indian Colony and falsified her enrollment application.

20. That the defendants had held alleged Tribal Council meetings not properly called both on and outside the exterior boundaries of the Winnemucca Indian Colony.

21. That defendants had intefered with the management and daily operations of the WINNEMUCCA SMOKE SHOP.

22. That defendants have caused plaintiffs legal fees and costs and expenses as a result of filing this matter with this Court and defendants are responsible for reimbursing these fees and costs.

CONCLUSIONS OF LAW

1. The Court adopts the findings of fact as set forth above as its conclusions of law.

2. That this Court maintains proper jurisdiction over the parties and the subject matter herein and this is the exclusive Court to determine matters regarding the Winnemucca Indian Colony. Attempts

to remove this Judge violated §1-40 of the Winnemucca Colony Law and Order code, and are hence invalid. Although the location of court sessions are not specifically mandated within the Tribe's Law and Order Code. The Court notes that under §1-70-010, the Chief Judge may prepare rules of the Court, including place of court sessions, which must be approved by the Tribal Council. No evidence was presented that rules have ever been adopted allowing for Tribal Court to be heard in Reno, Nevada, or any other outside location, and this Court feels, as a matter of law, that such an act denies tribal members from freely taking part in Court matters that would otherwise be held in their local community. There can be no justification for this removal of Court other than to prevent members attendance or to encourage miscarriage of justice.

3. Pursuant to the Winnemucca Tribe Law and Order Code, Plaintiff William Bills properly assumed the role as Acting Tribal Chairman lawfully and shall remain seated as the Acting Tribal Chairman until such time as an enrollment list and list of eligible voters is approved and certified and a valid election is then held in accordance with the Constitution and Bylaws and the Election Ordinance of this Tribe.

4. Acting Chairman William Bills maintains proper authority to protect and disburse funds in all bank accounts holding funds by and for the Winnemucca Indian Colony, including but not limited to all accounts in Bank of America, in the interest of the

Winnemucca Indian Colony and as Tribal law provides.

5. That Plaintiff William Bills is the only individual lawfully responsible for protecting and determining the assets and financial status of the Winnemucca Indian Colony and as such must fulfill this responsibility and duty to the people of the Winnemucca Indian Colony.

6. The 1999 Daewoo automobile, Vehicle Identification Number KLAVA6924XB163704 is tribal property and William Bills is to have control of said vehicle.

7. Defendants THOMAS WASSON, ELVERINE CASTRO and LUCY(WASSON) LOWERY are in possession of Tribal Assets and Official Documentation.

8. Defendant SHARON WASSON is not a duly elected or appointed Tribal Chairman or Tribal Council member of the Winnemucca Indian Colony.

9. Defendant ELVERINE CASTRO falsified her enrollment application and is not properly an enrolled member.

10. Defendants have interfered with the management and daily operations of the WINNEMUCCA SMOKE SHOP.

11. Defendants are responsible for Plaintiffs legal fees and costs.

12. The Winnemucca Indian Colony does not currently have a valid list of enrolled members and that any existing documents presented as such are invalid.

ORDER

Based upon the foregoing, the Court hereby orders as follows:

1. All Orders from any other Court or judge claiming to be the judge of the Winnemucca Indian Colony are invalid.

2. Plaintiff William Bills is the Acting Tribal Chairman until such time as an enrollment list and list of eligible voters is approved and certified and a valid election is then held in accordance with the Constitution and Bylaws and the Election Ordinance of this Tribe.

3. William Bills is the sole person to have access to all funds in all bank accounts holding funds by and for the Winnemucca Indian Colony, including but not limited to all accounts in Bank of America which include accounts numbered 690040043, 1000157141, and 690064282.

4. William Bills is the only individual with the authority to protecting and determine the assets and financial status of the Winnemucca Indian Colony.

5. Defendants are enjoined and prohibited from having access to or use of any Tribal bank accounts, including those located at Bank of America.

6. The 1999 Daewoo automobile, Vehicle Identification Number KLAVA6924XB163704 is to be immediately returned to William Bills who shall control of said vehicle and shall make all necessary decisions relating to said vehicle.

7. Tribal Council Meetings that have been held outside the Geographical and Jurisdictional boundaries of the Winnemucca Indian Colony and all of their resulting decisions are invalid.

8. Defendants THOMAS WASSON, ELVERINE CASTRO and LUCY(WASSON) LOWERY are to immediately return all Tribal Assets and Official Documentation in their possession to WILLIAM BILLS.

9. Defendant SHARON WASSON is not a member of the Tribal Council.

10. Defendants are ordered to refrain from interfering, with or participating in the management and daily operations of the WINNEMUCCA SMOKE SHOP.

11. Plaintiffs are awarded their legal fees and costs incurred in this matter.

12. The Winnemucca Indian Colony does not have a valid list of enrolled members.

13. Plaintiff's Amended Motion for Injunctive Relief and Ex-Parte Motion for Injunctive Relief this Court are hereby GRANTED.

Dated this 18th day of January, 2001.

/s/ Kyle B. Swanson
Kyle Swanson
Tribal Judge

CERTIFICATE OF SERVICE

I certify that I am an employee of KYLE B. SWANSON, ATTORNEY AT LAW and that on this date I delivered at Winnemucca, Nevada a true copy and correct copy of the ORDER FOR PERMANENT INJUNCTIVE RELIEF AND RESTRAINING ORDER in the above entitled captioned case to:

Treva J. Hearne, Esq.
575 Forest Street
Reno, Nevada 89509

Charlene Dressler
457 Timothy Way
Fallon, Nevada 89406

DATED this 19th day of January, 2001.

/s/ Tammy Bendell
TAMMY BENDELL

ca9_ecfnoticing@ca9.uscourts.gov
08-16146 Bank of America, N.A. v. Kyle Swanson, et al "Order Filed (From Chambers)"
November 9, 2010 9:41:57 AM PST
mitchwright@wrightlawoffices.com

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.**

United States Court of Appeals
for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 11/09/2010 at 9:41:51 AM PST and filed on 11/09/2010

Case Name: Bank of America, N.A. v. Kyle Swanson, et al

Case Number:

Document(s):

Docket Text:
Filed order (FERDINAND F. FERNANDEZ, BARRY G. SILVERMAN and KEVIN THOMAS DUFFY) Winnemucca Colony Council's (The Bills Group)

Petition for Panel Rehearing is DENIED. [7539770] (WL)

The following document(s) are associated with this transaction:
Document Description: Main Document
Original Filename: 08-16146.pdf
Electronic Document Stamp:
[STAMP acecfStamp_ID=1106763461 [Date=11/09/2010] [FileNumber=7539770-0] [00a177037e6b37f7190a19e17b9dc27cd3c1bbebafba3eff71b7a87eced6d7383f3f25dbb1dc44359fa6e301b1ce589dc4bccf844f9623dd57105d80869e6f7e]]

Notice will be electronically mailed to:

Ms. Hearne, Treva, General Attorney
USDC, Reno
Wright, Mitchell C., Attorney

Kern, Gayle A., Attorney (*daily summary*)

The following information is for the use of court personnel:

DOCKET ENTRY ID: 7539770
RELIEF(S) DOCKETED:
for rehearing by panel only
DOCKET PART(S) ADDED: 7329108, 7310005, 7310006, 7329109

Agreement on
Appellate Panel

This Agreement is made by Donald K. Pope representing individuals and a group calling itself the Winnemucca Colony Council, who are the original and successor plaintiffs in Winnemucca Tribal court case, CV 1003, originally titled William Bills, et al, Plaintiffs v. Sharon Wasson et al, Defendants and by Treva J. Hearne, representing individuals and a group calling itself the Winnemucca Indian Colony Council, who are the original and successor defendants in that case.

The case had a trial court decision dated May 9, 2002 by Judge Steven Haberfeld. The purpose of this Agreement is to establish how the appeal of that decision will be handled.

I. **3 Judges**

A. Chosen by Hearne & Pope

B. Goals:

1) persons independent of NV and Phoenix region

2) unknown to attorneys

3) experienced Indian law attorneys

C. Solution: Lenore Sheffler and 2 colleagues as indicated by her, Margaret (Peggy) Treuer and Jeannie Redding. Judges Treuer and Redding to submit resumes to counsel asap.

D. Paid by B of A money

E. Costs: Estimated 2 days judging. 2 days travel, deliberations, drafting order. Total: 4 days @ $1,500 = $6,000 plus travel & lodging = $1,000 X 3 judges = $21,000, cost of court clerk (estimate) = $4,000. See section III. Estimate of total cost = $25,000. However, the final agreement is to pay each judge by the hour. Judges to submit their billing rates and detailed bill.

F. The appellate panel will be paid promptly when their work is done. This agreement to pay promptly is not subject to other disputes that may exist between counsel that are not related to that work and that payment.

II. **Hearing**

A. July 24, 25, 2002

B. Reno Federal court house, court room 4, 6th floor, regular court security. No court reporter unless Judges request one.

C. 2 days if needed, start 9:00 A.M.

D. Render decision in writing ASAP/2weeks outside

III. **Court Clerk services**

A. 30 days to appeal from date of receipt (5/13/02)

B. File Notice of appeal with IDRS

C. Haberfeld's outfit (IDRS) to be paid for any court clerk services they provide, e.g. he bought 4 copis of the transcript.

D. Work to be done by IDRS staff not Haberfeld. Haberfeld to have no direct contact with appellate panel members

E. Appellate decision to be filed with IDRS and sent simultaneously to both counsel.

F. It turns out IDRS will not be providing very much of the court clerking or record preparation. Counsel may be doing most of it. So, the agreement is:

1. Pope or Hearne may be paid from B of A money for any court clerking or record preparation. 3 copies of transcripts, exhibits & related materials e.g. WIC LOC Title 1, Notices of Appeal, Order Appealed From, etc.

2. Rate $15.00/hr for attorney or staff. $0.02/page + costs of mailing, etc.. Payment not subject to other disputes.

3. Each side may review and approve contents of records.

4. Both sides send briefs straight to Chief Judge and each other.

5. Judges requested to not start review until all briefs and records are received.

6. Records to be sent ASAP.

IV. **Pleadings**

A. Statement of Rulings appealed from

B. Statement of issues

C. Each side has appealed in timely fashion. Timely appeal was jurisdictional. No other time limit is jurisdictional or grounds for fatal sanctions

D. Briefs – 2 brief system.

1. Each side, opening brief on its appeal by 6/28/02.

2. Each side, reply brief to other's opening by July 10, 2002.

3. No page limit but counsel discussed shooting for 25 pages to open, 15 to reply.

4. Since there is often little law in Indian country and none of it is binding on Winnemucca, the rule that lack of case authority means you have no case does not apply.

E. Standards for review

1. Constitutional issues – De novo

2. Legal issues de novo

3. Factual issues – any substantial evidence

F. Power of Court

1. Regarding ordering a new election, recognizing a council, establishing membership or merely establishing who is eligible for membership?

2. Ordering actions directly or merely remanding to Tribal court for actions consistent with decision?

3. Answer – same powers as federal appellate court, whatever those are?

G. Faxing, hand delivery or mailing is service or filing of any document

H. Rules of appeal – Winnemucca Law & Order Code

V. **Time Lines** – Covered elsewhere

VI. **Additional Agreements**

A. I-V do not require any agreements except the parties agreeing to do it – i.e. have the Appeal and pay for it.

B. Hearne will dismiss 2 related 9th Circuit appeals brought by her.

C. Federal District Court case re: B of A money goes on in meantime.

Date July 12, 2002 /s/ Donald K. Pope
Donald K. Pope
Attorney for Plaintiff
& successors

Date August 1, 2002 /s/ Treva J. Hearne
Treva J. Hearne
Attorney for Defendants & successors

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

THOMAS WASSON, SHARON WASSON JUDY ROJO, ELVERINE CASTRO, and MERLENE MAGIERA, in their capacity as Members of the WINNEMUCA INDIAN COLONY COUNCIL, and as individuals

Plaintiffs,

vs.

INTER TRIBAL COURT OF APPEALS, WILLIAM KOCKENMEISTER, PATRICIA STEARNS, T. LAURA LUI in their official capacity as Judges of the Inter Tribal Court of Appeals of Nevada,

Defendants. /

Case No. CV-N-04-0573-HDM

STIPULATION TO REINSTATE THE COUNCIL OF THE WINNEMUCCA INDIAN COLONY

(Filed Dec. 20, 2004)

COMES NOW, the WINNEMUCCA INDIAN COLONY, through its Counsel, **HAGER & HEARNE**, and THE INTER TRIBAL COURT OF NEVADA, through its representative and counsel, **WILLIAM KOCKENMEISTER**, and stipulates and agrees as follows according to the directions of the United States Federal District Court, the Honorable Howard McKibben:

1. The Council of the Winnemucca Indian Colony shall be reinstated according to the finding of the Specially Appointed Appellate Court of the Winnemucca Indian Colony (referred to as the Minnesota panel) in its order of August 16, 2002. The Council of the Winnemucca Indian Colony shall consist of Sharon Wasson, Thomas Wasson, Elverine Castro, Andrea Davidson, and William Bills as of date of the execution of this stipulation and these persons shall serve for so long as they are able or until another Council is elected pursuant to a membership chosen by this Council and elected at a valid and legal election of the Winnemucca Indian Colony.

2. The members of the Council shall within thirty (30) days publish a notice that states the following:

Membership applications for the Winnemucca Indian Colony shall be requested by sending a letter to THOMAS WASSON, Winnemucca Indian Colony, 910 Parr Blvd., #8, Reno, Nevada 89512 or by fax to 775-329-5819 with the applicant's address. Within two weeks of receipt of the request for application, the person sending the application shall receive an application packet. This packet must be returned to the Council of the Winnemucca Indian Colony within thirty (30) days for consideration of initial membership. Membership packets will be sent in the order in which they are received. Membership is an on-going consideration and if a person who wishes to be a member does not

make application in the first initial round of membership considerations by the Council, that person is encouraged to file a membership application for the next round of considerations by the Council.

3. The notice shall be published in the Winnemucca newspaper of general circulation. The notice shall be mailed to each address of persons who have been enrolled as members of the Winnemucca Indian Colony previously. The notice shall be mailed to Donald Pope, Esq. for dissemination to his clients who wish to submit an application. The notice shall be sent to the Bureau of Indian Affairs, Western Nevada Agency for posting by them. The notice shall be posted at the Inter-Tribal Council in Sparks, Nevada, for posting by them.

4. The transcript of the hearing in this matter shall be submitted to the Bureau of Indian Affairs at all levels to give the suggestion of the District Court to the Bureau that Inter-Tribal Court of Appeals should be funded at all times.

5. With the reinstatement of Sharon Wasson, Thomas Wasson, Elverine Castro, Andrea Davidson and William Bills by this stipulation, a meeting of the Council shall be held at the Winnemucca Public Library on January 15, 2005, in which a membership committee shall be appointed and the notice shall be prepared and sent to the parties indicated in this stipulation.

6. After notice and receipt of applications, the Council shall make an initial determination if the application is complete within thirty days after receipt of the application. If the application is not complete or there is a question regarding membership, a hearing shall be held within sixty days after the receipt of the application and notice shall be given to the applicant of the hearing and the issues or concerns to be addressed at the hearing.

7. At the hearing the Council shall determine the membership of the applicant by vote of the Council with a written decision to follow within sixty (60) days after the hearing and inform the applicant of its decision.

8. After the written decision of the Council, the applicant may file an appeal to the Inter-Tribal Court of Appeals regarding whether or not the Council abused its discretion in making a decision on the membership of the applicant.

THESE MATTERS ARE SO STIPULATED BY THE PARTIES AND SHALL BE SUBMITTED TO THE COURT WITHIN TWO DAYS OF THE SIGNATURES OF THE PARTIES.

/s/ Robert R. Hager	/s/ William Kockenmeister
Robert R. Hager, Esq. Attorney for the WINNEMUCCA INDIAN COLONY	William Kockenmeister Representative and counsel for the INTER TRIBAL COURT OF APPEALS

HAGER & HEARNE

Attorneys at Law

Robert R. Hager
Treva J. Hearne

245 E. Liberty, Ste. 110
Reno, Nevada 89501
(775) 329-5800-Telephone
(775) 329-5819-Facsimile

Via facsimile: 208-888-5989

October 15, 2010

Mr. Rich Jenikovsky, Sales Manager
Capitol Distributing
3500 Commercial
Court Meridian, ID 83642

re: Winnemucca Indian Colony smoke shop

Dear Mr. Jenikovsky:

Please find enclosed herewith a copy of the decision by the Ninth Circuit Court of Appeals that the proper Winnemucca Indian Colony has Thomas Wasson as its Chairman. Please accept this as official notice that Mr. Allen Ambler is not authorized to manage or order any product for the Winnemucca Indian Colony smokeshop and that the Winnemucca Indian Colony will not be responsible for any of the debts incurred by Mr. Ambler with your business.

VERY TRULY YOURS,

TREVA J. HEARNE

HAGER & HEARNE

Attorneys at Law

Robert R. Hager
Treva J. Hearne

245 E. Liberty, Ste. 110
Reno, Nevada 89501
(775) 329-5800-Telephone
(775) 329-5819-Facsimile

October 13, 2010

Via facsimile: 322-6088

Mr. Don Pope, Esq.
1188 California Ave.
Reno, Nv. 89509

re: ***Winnemucca Indian Colony***

Dear Mr. Pope:

If your clients will peacefully and completely exit the governance and occupation of the Winnemucca Indian Colony within 5 days from this date, October 18, 2010 at 5 p.m., my clients can again offer to not seek damages against your clients personally for the conversion of their property and profits. This does not include the right to seek attorneys' fees for the appeal. Please contact me immediately if your clients agree to this turn over of the Colony trust lands and I will prepare the documents for signature.

VERY TRULY YOURS,

/s/ Treva J. Hearne
TREVA J. HEARNE

HAGER & HEARNE

Attorneys at Law

Robert R. Hager, Esq.
Treva J. Hearne, Esq.*

245 E. Liberty Street,
Suite 110
Reno, Nevada 89501
(775) 329-5800-Telephone
(775) 329-5819-Facsimile

November 9, 2010

Via Facsimile 324-1118

Mitchell C. Wright, Esq.
325 W. Liberty Street
Reno, NV 89501

Re: Winnemucca Indian Colony

Dear Mr. Wright:

Today, the request for rehearing that you filed was denied. Unless you intend to appeal to the United States Supreme Court, this case is finally finished. Please advise your clients that my clients will seek civil damages and criminal prosecution against them for unlawfully occupying the Winnemucca Indian Colony.

We will be glad to work out an orderly exit as long as it is within the next fourteen days. If you have any questions regarding this matter, please contact me.

Sincerely,

/s/ Treva J. Hearne/jrs
Treva J. Hearne

TJH/jrs

**Also admitted In California and Missouri*

No. 10-1011

Supreme Court, U.S.
FILED
MAR 11 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

WINNEMUCCA COLONY COUNCIL,

Petitioner,

v.

SHARON WASSON and the WINNEMUCCA INDIAN COLONY COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

TREVA J. HEARNE, ESQ.
HAGER & HEARNE
245 E. Liberty Street
Suite 110
Reno, Nevada 89501
Telephone: 775-329-5800
Facsimile: 775-329-5819
Email:
thearne@hagerhearnelaw.com

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. RESPONSE TO HISTORY OF PROCEEDINGS RECITED BY THE PETITION FOR WRIT OF CERTIORARI 1

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 7

A. THE QUESTIONS PRESENTED IN THE PETITION WERE NEVER RAISED OR DECIDED IN THE COURTS BELOW 7

B. THE NINTH CIRCUIT'S AFFIRMANCE OF THE UNITED STATES DISTRICT COURT DECISION WAS DECIDED CORRECTLY 9

III. CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

AT & T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899 (9th Cir. 2002) 13

Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136 (9th Cir. 2001) 13

Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) 11

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 116 S.Ct. 2211 (1996) 1

Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895) 13

Kemp v. Hudgins et al., 59 U.S. 530 (1855) 1

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1998) 13

Kirshner v. Uniden Corp. of Am., 842 F.2d 1074 (9th Cir. 1988) 1

Kishell v. Turtle Mountain Housing Authority, 816 F.2d 1273 (8th Cir. 1987) 13

LECG, LLC v. Seneca Nation of Indians, 518 F.Supp.2d 274 (U.S.D.C. Fed. 2007) 13

Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority, 207 F.3d 21 (1st Cir. 2000) 13

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 9

Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc., 569 F.3d 932 (9th Cir. 2009) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. United Foods, Inc., 533 U.S. 405 (2001) 8

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 8

STATUTES

25 U.S.C. § 450 ..... 8, 9

RULES

Federal Rule of Appellate Procedure 35 5

I. RESPONSE TO HISTORY OF PROCEEDINGS RECITED BY THE PETITION FOR WRIT OF CERTIORARI.

The Petition for Writ of Certiorari relies upon a recitation of facts that are not in the record below. The Petitioner's Appendix ("Pet. App.") includes the decision of the Interior Board of Indian Appeals (Pet. App. 8-24) chastising the Regional Office of the BIA for not recognizing a government of this Federally Recognized Tribe which was issued on December 17, 2010, nearly two months after the October 14, 2010 Ninth Circuit Decision. The Petitioner's Appendix also contains letters from Counsel (Pet. App. 185-188) which were not written until well after the Ninth Circuit Decision was issued; thus, Petitioner's Appendix 8-24 and 185-188 should be stricken.[1]

Petitioner's Appendix 47-71, 99-171, 174-179, were also not included in the excerpts of record to the Ninth Circuit and should also be stricken. *Kemp v. Hudgins et al.,* 59 U.S. 530 (1855). Thus, the gratuitous, rambling comments included in Petitioner's History which are unsupported by any record should be disregarded by this court.

---

[1] *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 454, 116 S.Ct. 2211, 2232 (1996) (" . . . our power is restricted by the Constitution to the determination of the questions of law arising upon the record."). *Accord, Kirshner v. Uniden Corp. of Am.,* 842 F.2d 1074, 1078 (9th Cir. 1988) (striking portions of excerpts of record that were "neither filed with the district court, considered by the court, nor even before the court when it entered the order that [appellant] now challenges on appeal.").

The relevant history of this case begins with the February 22, 2000 brutal murder (which is yet unsolved by federal authorities) of Glenn Wasson, the Chairman of the Winnemucca Indian Colony, at the Administration Building of the Colony. On that fact, all parties and courts agree. (Petition, page 4, Pet. App. 2, 31) The chronology as set forth in the United States District Court Decision is correct. (Pet. App. 31-34) Bank of America placed the bank account of the Colony into interpleader after two groups claimed that each was the government of the Winnemucca Indian Colony after Glenn Wasson's murder. (Pet. App. 31-33) Then ten years of litigation ensued. (Pet. App. 34)

By late 2000, the members were litigating to prove, on the one hand, their right to assume the government in Tribal Court and litigating the right, on the other hand, to receive the bank account in Federal Court. (Pet. App. 32-34) When the dispute began, an Inter-Tribal Court of Nevada existed, which had been funded by the Bureau of Indian Affairs ("BIA"). (Pet. App. 32) The parties were before the Inter-Tribal Court when they agreed to have a mediator hear the dispute sitting as the Tribal Court because no complete record of any Tribal Court proceeding existed from which the members could properly appeal. (Pet. App. 33) Several weeks of hearing took place. A decision was issued. (Pet. App. 33)

In 2002, at about the same time the decision was rendered by the mediator sitting as the Tribal Court,

one of the other matters in the federal court was appealed to the Ninth Circuit. The parties took it upon themselves, with the help of the Ninth Circuit mediation program, to stipulate to a Court of Appeals consisting of a three judge panel to hear the appeal of the decision rendered by the mediator. (Resp. App. 41, 42 [Supplemental Excerpts of Record, Ninth Circuit Appeal ("SER") 000178]). What is referred to by the United States District Court as the "Minnesota Panel" came from the agreement between the parties pursuant to this mediation at the Ninth Circuit Court of Appeals.[2]

The United States District Court provided a courtroom and the parties argued and briefed the appeal. From that process, the Minnesota Panel issued a decision. (Pet. App. 72-96; Resp. App. 42) Nothing else is relevant or, for that matter, appropriate for consideration since the recitations by the Petitioner are, as stated above, not in the record of this case.

Without a doubt both parties' attorneys signed the agreement for the Minnesota Panel on behalf of their clients. (Pet. App. 33) Any allegations to the contrary are mere excuses for the inability of the Petitioner to face the reality of their loss of this matter from the date of the Minnesota Panel until the

---

[2] The Specially Appointed Appellate Panel was generally referred to as the Minnesota Panel because the members of the Panel were from Minnesota. The Specially Appointed Panel consisted of judges from the Sioux Nation. (Pet. App. 33; Resp. App. 42)

date of the filing of this Petition by each and every objective tribunal that has considered these matters.

The Honorable Howard McKibben, United States District Court, District of Nevada, stated that the Minnesota Panel had prepared a well reasoned decision after "a lot of hard work." He also commented that "when parties made an agreement, they needed to abide by that agreement." (Resp. App. 30 [SER 000238])

When Judge McKibben retired to senior status, the interpleader case was assigned to the Honorable Brian Sandoval, who, upon the submission of a Request for Distribution of Account and Dismissal of Interpleader/Supplemental Motion for Summary Judgment issued an opinion on March 6, 2008, distributing the bank account to the Winnemucca Indian Colony, Thomas Wasson, Chairman. After denial of reconsideration, the Bills group appealed Judge Sandoval's decision to the Ninth Circuit, which decision is now the subject of this Petition for Certiorari.

Petitioner appears to raise a criminal defense of ineffective assistance of counsel in this civil matter. This is obvious since newly retained counsel filed a Petition for Panel Rehearing in the Ninth Circuit "in an effort to be afforded the opportunity to rectify these shortcomings and provide the appellate court with a complete and comprehensive record for reconsideration." (Petition, page 10) This is not the

function of a Petition for Panel Rehearing and the Ninth Circuit appropriately denied rehearing.[3]

The truly lamentable aspect of this long litigation is that this matter has continued for over ten years without an enforceable resolution until now. This is a sad commentary on the lack of judicial process available to the small Native American communities of Nevada who must, of economic necessity, depend upon their infrastructure of justice from the Department of the Interior, Bureau of Indian Affairs. The BIA's dissolution of the Inter-Tribal Court of Appeals upon a budgetary whim for over a year during this dispute and the lack of recognition of a government left the United States District Court with the burden of determining how to resolve the interpleader.[4]

---

[3] FRAP 35, A party may request a rehearing *en banc* when:

> the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or
>
> the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

[4] The District Court recognized that the lack of an appellate court available to the Winnemucca Indian Colony when it was

(Continued on following page)

Each and every federal judicial body that reviewed this case agreed to extend comity to the Minnesota decision, in its entirety. Thus, notwithstanding the fact that Petitioner has failed to file briefs that comply with the Rules of Court,[5] and

---

needed for the review of the Tribal Court decision was a denial of their due process rights. The Honorable Howard McKibben expressed his dismay at the BIA's failures:

> There is one thing that's very troubling to me about all of this. I can't, for the life of me, understand why there wouldn't be adequate funding out there to keep a court of appeals alive and well, so that it can decide these issues. And to the extent the BIA doesn't fund something like that, I think that's a travesty . . .
>
> And to the extent my words mean anything, they should always fund something like that. Everybody has the right to go into court. Everybody has the right to an appellate review. And everybody in the colony should have that right. And they should have as much of a right as anybody else in the United States to come into court and have their grievances resolved. And to the extent the BIA or anybody else disenfranchises somebody from not being able to go and do that – I mean, heaven help us if all the funding is cut off from the courts in this country so people don't have some right to assert and protect their constitutional rights.

(Resp. App. 37, 38 [SER 000341, 000342])

[5] Here, the Bills Group did not include an Excerpts of Record with their opening brief. The Bills Group's opening brief lacks appropriate record citations. Had the Wasson Group not filed a Supplemental Excerpts of Record, we would have to scour the district court record for the decisions appealed from and other pertinent portions of the record. Even in the district court record, many of the Exhibits, including vital tribal court rulings, were submitted only in part. For

(Continued on following page)

notwithstanding the fact that Petitioner has failed to live up to the agreements that it entered into to resolve this matter, both the United States District Court and the Ninth Circuit Court ignored these breaches of protocol and advocacy and made their decisions based upon well-reasoned considerations of the facts and the law.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. The questions presented in the Petition were never raised or decided in the courts below.

The Petitioner has cited a statutory provision that has not been raised until this appeal. Neither does the statement of the case summarize what, in fact, were the issues in the lower court decisions.

The Petition completely ignores the fact that this Court will not review questions that were not properly

---

example, the Bills Group only submitted three selective pages of the Inter-Tribal Court of Appeals's March 19, 2004 decision on the jurisdiction of the Minnesota Panel, and no party provided that decision in its excerpts of record to this court. Due to the complete disrespect for the rules of this court and the rule of law, we seriously considered summarily dismissing this appeal. However, on the unique facts of this case, we concluded that the clients should not be punished for the failings of their attorneys.

Pet. App. 6, 7.

presented to, or decided by, the courts below absent unusual circumstances. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to "allow a petitioner to assert new substantive arguments attacking . . . the judgment [below] when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.")

Throughout the entire ten year litigation in federal court, Petitioner never raised the issues regarding "sovereign immunity" or "trust responsibility" which they now seek to bring before this Court under 25 U.S.C. § 450. As noted above, in the District Court Petitioner argued repeatedly that the decision issued by the Minnesota Panel – a court to which Petitioner expressly stipulated – was incorrectly decided.[6] Then, after the May 7, 2007 Inter-Tribal Court of Appeals order dismissing the case due to a lack of appellate jurisdiction, Petitioner affirmatively argued that it was "entitled to summary judgment

---

[6] The closest Petitioner ever came to raising any type of jurisdictional argument was in its Motion for Reconsideration of the District Court's Order, when it argued that a 25 CFR § 11.100 court should hear the matter. (Pet. App. 26-27) However, the District Court correctly noted that 25 CFR § 11.104(b) specifically excluded from such a court's jurisdiction "an election dispute or . . . any internal tribal government dispute." (Pet. App. 27-28)

following the May 7, 2007 order, because that order rendered all litigation before [the Minnesota Panel] null and void. . . ." (Pet. App. 34) Both the U.S. District Court and the Ninth Circuit soundly rejected this argument.

At no time prior to filing the Petition for Writ of Certiorari did Petitioner argue that the federal courts were "interjecting" themselves into the "fray of competing tribal factions . . . in contradiction to policies of self-determination and self-governance under 25 U.S.C. § 450n." To the contrary, Petitioner actively *sought* relief from both the Federal District and Federal Appellate Courts. It was only when Petitioner lost on appeal that it seized on these entirely new arguments in its Petition for Writ of Certiorari.

A "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of the questions presented in the petition," *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). The Court should decline to accept Certiorari where the issues presented have not been properly preserved below.

B. The Ninth Circuit's affirmance of the United States District Court decision was decided correctly.

On March 6, 2008, when the decision granting summary judgment was entered by the United States District Court, District of Nevada, the Court had retained the interpled funds of the Winnemucca

Indian Colony since July 2000. The Court waited patiently for the tribal processes to be exhausted. In a well-reasoned opinion in 2003, the Magistrate for the District Court required that tribal processes be further exhausted, even though the parties had agreed by stipulation to an appeal and agreed to abide by it.[7] That ninety days stretched into five years.

---

[7] When the "occupation group (who no longer included William Bills)" failed to abide by the decision, the Magistrate expressed her regret but allowed a further attempt at exhaustion, stating:

> When the court received the stipulated Court of Appeals decision, it seemed as though parties had settled, and that the wait to disburse the money was over. However, despite all of the time and money spent by the parties, it appears that they are determined to prolong this process. The Bills group has challenged the subject matter jurisdiction of the stipulated Court even though the Bills group fully participated in the negotiations to have the appeal heard before that forum. After the stipulated Court of Appeals rendered an unfavorable decision to the Bills group and after payment of $30,847.32 to the stipulated Court of Appeals for its services, the Bills group now raises for the first time the issue of subject matter jurisdiction. Under the doctrine of tribal exhaustion, federal courts must "stay their hand" until tribal courts have had the opportunity to determine their own jurisdiction. . . . Despite the fact that the court is reluctant to extend this case any longer, in the interests of tribal self-determination and self-government, the court will stay these proceedings for ninety days. . . .

Order, Magistrate Valerie Cooke, Dated 2/13/03. (Resp. App. 55, 56 [SER, page 00186, lines 12-22])

"Tribal jurisdiction cases are not easily encapsulated, nor do they lend themselves to simplified analysis. The Supreme Court itself observed that questions of jurisdiction over Indians and Indian country are a complex patchwork of federal, state and trial law."[8] There are two potential sources of tribal jurisdiction: a tribe's inherent sovereignty and congressional statutory grant.[9] Neither of these issues were pled or used as a defense to the federal court's jurisdiction in interpleader in this case. In fact, the only argument was that the complete exhaustion of Tribal remedies had not occurred because the BIA had in 2003 again funded the Inter-Tribal Court of Appeals of Nevada. In an abundance of respect for Tribal processes and deference to the Tribal court system and because the ultimate question was the determination of the proper recipient of the bank account on behalf of the Tribe, the District Court found that the issue of who was the proper council and membership of the Colony was inherently one over which the Tribal Court had jurisdiction. (Pet. App. 35-37; Resp. App. 55, 56)

Rather than ninety more days of Tribal exhaustion as anticipated by the Magistrate in the Order of February 13, 2003, the Bills' group was given five more years of Tribal exhaustion which included at least two appellate orders, with the final one stating

---

[8] *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 936, 937 (9th Cir. 2009) citing *Duro v. Reina*, 495 U.S. 676, 680 n.1, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990).

[9] *Philip Morris USA, Inc.*, cited supra, at page 937.

that the Inter-Tribal Court of Nevada had no jurisdiction over the matter. (Pet. App. 37) There is no Tribal "Supreme Court," there is no further Tribal remedy available after the Specially Appointed Appellate Panel of the Winnemucca Indian Colony (Minnesota Panel) issued its Order and the Inter-Tribal Court of Nevada dismissed any further appeal for lack of jurisdiction.

The District Court did "stay its hand," until Tribal remedies were exhausted on the question of who composed the proper Council to receive the account, stating that the Court recognized the "importance of tribal courts in promoting and encouraging tribal sovereignty." The Court, however, determined that "In this case, the tribal court has had a full opportunity to determine its own jurisdiction. This matter has been pending for over seven years." Only when the Inter-Tribal Court of Appeals entered an Order dismissing the case for lack of jurisdiction, did the United States District Court go forward and correctly determined that "the parties had exhausted all tribal remedies." (Pet. App. 36, 37)

The District Court was deferential to the Tribal Court process, even while it recognized the disingenuousness of the Bills' group who refused to abide by the decision of the Minnesota Panel after their counsel had signed the stipulated agreement in the Ninth Circuit mediation on their behalf. The Tribal exhaustion occurred exactly as the District Court recited in its Order in that the Magistrate allowed a further appeal to the reconstituted Inter-Tribal Court of

Appeals of Nevada which, once again, the BIA had funded by the end of 2003 (Pet. App. 34). The Inter-Tribal Court of Appeals of Nevada determined that it had no jurisdiction, all Tribal remedies were exhausted (Pet. App. 34). This agreed with the holding in *Kishell v. Turtle Mountain Housing Authority,* 816 F.2d 1273, 1276 (8th Cir. 1987). The Ninth Circuit affirmed the District Court by concluding that the parties had exhausted their tribal remedies and added that "the parties have been afforded more than due process in both tribal and federal court." (Pet. App. 5)

The United States District Court recognized the Minnesota Panel decision on grounds of comity.[10] (Pet. App. 5) The concept of comity for Tribal Court decisions is well accepted by Federal Courts.[11] In further support of the District Court's decision, the Ninth Circuit added that recognizing the decision of the Minnesota Panel was appropriate because to

---

[10] "Comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard . . . to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895). "As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity." *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002).

[11] *LECG, LLC v. Seneca Nation of Indians,* 518 F.Supp.2d 274 (U.S.D.C. Fed. 2007); *Kerr-McGee Corp. v. Farley,* 115 F.3d 1498 (10th Cir. 1998); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136 (9th Cir. 2001).

recognize any other decision offered by the Bills group "is inconsistent with the parties' contractual choice of forum." (Pet. App. 5)

Exhaustion of Tribal remedies and extending comity to a Tribal Court decision were the only two issues brought before the United States District Court. Likewise, these were the issues argued before the Ninth Circuit Court of Appeals. Both issues were addressed by both courts. The issues are resolved, concluded, and decided correctly and this Petition for Writ of Certiorari should be denied.

III. CONCLUSION

The Petition for Certiorari should be denied because it raises issues not preserved in the United States District Court and the Ninth Circuit Court below. The Petition should be denied because, after waiting patiently for an elongated Tribal Court process, the United States District Court and the Ninth Circuit were convinced that the Tribal processes had been exhausted and only then, did both Courts follow the accepted federal law of comity in recognizing the decision of the Specially Appointed Court

of Appeals of the Winnemucca Indian Colony, the Minnesota Panel.

Respectfully submitted,

TREVA J. HEARNE, ESQ.
HAGER & HEARNE
245 E. Liberty Street
Suite 110
Reno, Nevada 89501
Telephone: 775-329-5800
Facsimile: 775-329-5819
Email:
thearne@hagerhearnelaw.com

Counsel for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Thomas Wasson, et al.,

Plaintiff,

-vs-

Inter-Tribal Court of Appeals of Nevada; et al.,

Defendants. /

NO. CV-N-04-573-HDM(VPC)
United States District Court
400 S. Virginia Street
Reno, Nevada 89501
December 10, 2004

TRANSCRIPT OF PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION (#4)

BEFORE THE
HONORABLE HOWARD D. McKIBBEN
UNITED STATES DISTRICT JUDGE

(Filed Jan. 11, 2005)

APPEARANCES:

FOR THE PLAINTIFF: Robert R. Hager
Treva Hearne
Attorneys at Law

FOR THE DEFENDANT: William Kockenmeister
Attorney at Law

Proceedings recorded by mechanical stenography produced by computer-aided transcript

OFFICIAL COURT
REPORTER: KATHRYN M. FRENCH, RPR
NEVADA LICENSE NO. 392
CALIFORNIA LICENSE NO. 8536

[2] Reno, Nevada, Friday, December 10, 2004, 9:00 a.m.

- - - OoO - - -

THE CLERK: Case number CV-N-04-573-HDM(VPC), Thomas Wasson, et al. versus Inter-Tribal Court of Appeals of Nevada, at al.

Robert Hager and Treva Hearne are present on behalf of plaintiffs. William Kockenmeister is present on behalf of the defendants.

THE COURT: Okay. Thank you, Miss Clerk.

This is the time set for the hearing on the motion for preliminary injunction. I've he reviewed the pleadings that have been filed here.

Counsel, are you ready to proceed?

MR. HAGER: Ready on behalf of the plaintiffs, Your Honor.

MR. KOCKENMEISTER: Ready on behalf of the defendants, Your Honor.

THE COURT: All right. Thank you. You may go ahead.

MR. HAGER: Good morning, Your Honor.

Your Honor, the first issue in this case today is whether the ITCA has any jurisdiction. Jurisdiction cannot be waived. It either exists or it doesn't exist.

The ITCA provides for appellate review for Nevada tribes, quote:

"Which by resolution of the respective Tribal [3] Councils or the Tribal Law and Order Code, designate appeals to held by the Nevada Inter-Tribal Court of Appeals," end quote.

That's what the basis for jurisdiction of the ITCN is, Your Honor.

THE COURT: Well, let me suggest that I don't think there's any question that the Inter-Tribal Court of Appeals has the right to review matters on appeal from a decision of a tribal judge. There are some things, and the reason I set this hearing – and maybe it would be easier if I just ask some questions because I need to try to get some history on this. I'm well aware of a lot of problems that have arisen in the context of this dispute going back to 2000 in connection with other litigation that we've have, and it's very unfortunate, and I've attempted to have other matters resolved.

What was the basis on which matters were submitted to what I'll call the Minnesota Panel? Was it a stipulation?

MR. HAGER: Yes, Your Honor.

THE COURT: All right. Signed by whom?

MR. HAGER: Signed by, I believe, all sides; all parties to the disputes in Winnemucca.

THE COURT: And was that in written form?

MR. HAGER: I believe the stipulation was in written form. There was no dispute with regards to the establishment [4] of that special panel.

THE COURT: And what did the stipulation say with respect to whether or not the parties would be bound by that decision?

MR. HAGER: Well, there's a dispute in that regard as well, Your Honor. I know –

THE COURT: Putting aside the dispute, what did the language say? I haven't seen it. I'd like to see the document. Is there a specific document that was signed by all the parties?

MR. HAGER: Let me see if I can answer that question.

THE COURT: If you have that, I would like to take a look at it.

MR. HAGER: Your Honor, we do have it at the office, but I don't have it here today.

THE COURT: Okay. Well, can you give me your best recollection of what it says about whether the parties agree to be bound by that decision.

MR. HAGER: It is our position that it does provide that the parties agree to be bound by that decision. There is –

THE COURT: What's the language, to the best of your knowledge?

Okay. I'm kind of back on the circular thing, I [5] guess, but, you know, I am concerned about that.

Now, that panel was created by the Ninth Circuit arbitrator, isn't that true?

MR. HAGER: Well, there is a subsequent decision by the Ninth Circuit directing that the – any appeal from that panel should go to the Interior Board of – and let me state –

THE COURT: What appeal? What decision is that? I haven't seen it. Was that cited in the briefs?

MR. HAGER: I don't believe it was.

THE COURT: I would like to know what that decision is. What is it?

MR. HAGER: There is an appeal pending right now before the Interior Board of –

THE COURT: Okay. This is – this is all interesting. Now, can somebody give me the citation on that?

MR. HAGER: On the Ninth Circuit decision, Your Honor?

THE COURT: Yes.

MR. HAGER: I think I can give you the name of the case.

THE COURT: Okay. Let's start with that.

Counsel, could you come up here? If you want to kind of assist on some of this, we'll save some time. You may know some of the background here that will be helpful.

[6] MS. HEARNE: Yes. Excuse me, Your Honor. Treva Hearne on behalf of –

THE COURT: Yes.

MS. HEARNE: Your Honor, the history of this litigation was that when we first appealed the rejection of a temporary restraining order to put the assets in trust –

THE COURT: Yes.

MS. HEARNE: – we were before a Ninth Circuit Court of Appeals mediation service, and they asked if we could agree to an appeal. We then wrote a very summary sort of fashioned agreement, which Mr. Pope wrote. And what he claims is, well, I didn't say that that would be the final appeal. Well, there is no appeal beyond the – if it were –

THE COURT: Let's not get into a whole lot of the nuances of it.

MS. HEARNE: Right.

THE COURT: There was a draft and it was signed, who signed it?

MS. HEARNE: I signed it on behalf of the Winnemucca Indian Colony. Mr. Pope signed it on behalf of –

THE COURT: The parties didn't sign it, but each of you signed it on behalf of your respective clients?

MS. HEARNE: That's correct, Your Honor.

THE COURT: All right. And then was there an order entered by anybody pursuant to that stipulation?

[7] MS. HEARNE: No. What there was was a dismissal of the actions before the Ninth Circuit, based upon our entering into that stipulation.

THE COURT: Okay. And then the panel was convened and who paid for the panel?

MS. HEARNE: The Winnemucca Indian Colony account, which is now held by the federal court and Valerie Cooke, magistrate.

THE COURT: And that's where that money came from, correct?

MS. HEARNE: That's correct, Your Honor. And it was held in the courtroom of Valerie Cooke.

THE COURT: And there was a written agreement, since it was signed, and what did it say about being bound? What was the language to the best of your recollection?

MS. HEARNE: It said there would be an appeal, and that that appeal would be before these justices, and that they would hear it, and there would be an order issued.

THE COURT: That was because the Bureau of Indian Affairs hadn't funded a –

MS. HEARNE: Inter-Tribal court.

THE COURT: – and Inter-Tribal Appellate Court, is that right?

MS. HEARNE: That's correct.

THE COURT: Okay. And was there any language in [8] there that said that the parties agree to be bound by that decision?

MS. HEARNE: There was no language that said that exact word.

THE COURT: Okay. Now, as I understand what has just been said, Mr. Hager was telling me a minute ago that there was a provision someplace that indicated that that decision was subject to review by someone in the BIA.

Is that right; or did I miss understand?

MS. HEARNE: That was just a misunderstanding because there are two or three lines of litigation in this case.

THE COURT: I'm amazed there aren't more.

MS. HEARNE: Once the Ninth Circuit Court of Appeals turned back that appeal and said you must exhaust your administrative remedies –

THE COURT: Right.

MS. HEARNE: – the thing that's being appealed through Interior Board of Indian Appeals is whether or not the BIA must recognize a council of a federally recognized tribe. And in addition to, I have asked that the Winnemucca Indian Colony Council, Thomas Wasson, be recognized, because of the historic membership before them, and they have all the records. That still has not been determined.

And the Special Panel's decision made the same [9] conclusion, and that was because of the historic records, that Thomas Wasson, and all the people who were the council as of the date that Glen Wasson was murdered, should be reinstated.

THE COURT: Now, the decision –

MS. HEARNE: That's all that's before the Interior Board.

THE COURT: The decision I'm talking about, the Minnesota Panel, that came down August 16th, 2002.

MS. HEARNE: That's correct.

THE COURT: How long was it after that that the BIA suddenly came up with some money so that they could fund the Inter-Tribal Court of Appeals again?

MS. HEARNE: I believe they came up with money sometime in 2003.

THE COURT: Okay.

MS. HEARNE: They started, I think, about August of 2003.

THE COURT: So August – it was about a year later?

MS. HEARNE: They can answer that better than I can, they've got –

THE COURT: So, approximately a year later, you think they funded the Inter-Tribal Court of Appeals.

And I take it, during that period of time, until the Inter-Tribal Court of Appeals came into existence, and then there was this appeal up through the process there, what, [10] if anything, was done to comply with the provisions of this order entered by this Minnesota Panel?

MS. HEARNE: Well, certainly that was a dispute, Your Honor, but we asked the Bureau of Indian affairs to please allow us to re-enter their lands. And they refused to do that.

THE COURT: So, really, nothing happened.

MS. HEARNE: Other than we went ahead with membership. We went ahead doing everything else the Court instructed us to do.

THE COURT: That you could do.

MS. HEARNE: That we could do.

THE COURT: Right. But was there any – obviously there was no election held?

MS. HEARNE: Yes, we had –

THE COURT: There was an election held?

MS. HEARNE: Absolutely. We've held election –

THE COURT: It says October of 2002 election of WIC shall occur within six months of October 2002.

MS. HEARNE: And we did do that, and we held one in October of 2004, Your Honor.

THE COURT: All right. And what was the appellate route for challenging enrollment issues?

MS. HEARNE: Enrollment issues, once determined by Tribal council, once it's recognized –

[11] THE COURT: Yeah.

MS. HEARNE: – would be – could be appealed to the Inter-Tribal Court if –

THE COURT: If there was no Inter-Tribal Court. That's my point.

MS. HEARNE: Right.

THE COURT: Isn't that true?

MS. HEARNE: At that –

THE COURT: So I don't see how there could have been due process for an appeal. And that's my concern here.

MS. HEARNE: Prior to 2000 there was, Your Honor.

THE COURT: I'm not concerned about 2000. I'm talking about the so-called 2002 election that was ordered by the Minnesota Panel.

MS. HEARNE: Right.

THE COURT: There was no mechanism in place – Well, let's backup.

It seemed to me a critical concern was the enrollment issue; who has the right to vote? That's been the basis of a lot of this dispute all along. And, who has the right to vote, who has the right to be enrolled is an issue that ultimately should be determined by the tribal court. The council that can make some certifications, but the tribal court has the right to review it, in my opinion.

The Inter-Tribal Appellate Court, if it exists, [12] has the right to review that. And, ultimately, at least due process issues can come to this court. That's my opinion. You may agree or disagree, but that's the way I see the posture of things. And that hasn't happened, and that's what's of concern to me.

Now, whether or not we rely on what happened in this Minnesota Panel, or we rely on what is being

said here by the Inter-Tribal Court of Appeals, it seems to me that the process that should be in place is to allow, if they're the warring factions or whatever here, to present lists, and to that extent, I'm inclined to agree with what has been done here, subject to appellate review as to the legitimacy of the people that are claiming entitlement to be enrolled and to vote, have that be reviewed, have their right of due process, and then this court could do two things:

One, if it's appealed here, one would be to determine whether or not those people had due process. That is, did they have the right to a fair hearing, notice and a fair hearing with respect to whether or not they were properly enrolled; and

Two, did the Inter-Tribal court act beyond its jurisdictions in making those determinations? In other words, was there something fatally flawed about the whole process?

So that's why whether or not we're dealing with what was done by the Minnesota Panel, or if we deal with [13] what's been done by this Inter-Tribal Court, that's the fair way fox. this matter, ultimately, to be resolved in my mind.

Now, tell me why you don't agree, if you don't.

MR. HAGER: Your Honor, the issue of membership is a fundamental issue which is solely within the control of the tribe. And that determination is to be made by the council pursuant to the constitution and the by-laws of the Winnemucca Indian Colony.

THE COURT: Well, they can designate the basis for enrollment, but whether or not somebody under those conditions, under whatever their constitutional provisions are, the Tribal Court and the Appellate Tribal Court have the right to review that, in my opinion.

MR. HAGER: And that's the process we're asking to have applied here; that the council makes the determination first. That's solely within their power –

THE COURT: Well, see, we have a problem here because who is the council?

MR. HAGER: Well, everybody agrees who the council is, even the Inter-Tribal Court of Appeals agrees who the council is. It's the council that was designated by the special. Minnesota Panel.

The problem is where they go from there. They then say there's no way to dispute that that is the council. But, we're doing to make a decision on who is the enrolled members.

[14] Well, that doesn't follow, Your Honor. That's what –

THE COURT: See, that's not exactly what I understood, because I understood that the Minnesota Panel indicated these people are the panel, which would be the – or the council, and those are the ones that are designated as plaintiffs in this action in this court, correct?

MR. HAGER: That's correct.

THE COURT: It was my understanding that the decision out of the Inter-Tribal Appellate Court was that you go back to 2000 and that would be the council, is that true?

MR. HAGER: That's what we're saying. We'll go back to that council. All of the remaining available members of that council are plaintiffs in this case, Your Honor.

THE COURT: Are both parties telling me that they've agreed on who the council is?

MR. HAGER: That's not in dispute, Your Honor. Exactly.

THE COURT: Okay. Who are they?

MR. HAGER: And it's set forth – it's Tommy Wasson – Thomas Wasson. I'm sorry.

THE COURT: Right.

MR. HAGER: Sharon Wasson.

THE COURT: Right.

[15] MR. HAGER: Bills, who is unavailable. He's disappeared.

THE COURT: Well, yes. I mean, it looks like there's a vacancy there.

MR. HAGER: And Elvirene Castro.

THE COURT: Elvirene Castro and Bills.

Who is Lucy Wasson Lowery?

MR. HAGER: She's deceased, Your Honor.

THE COURT: All right. I mean, she's listed in the decision by the Inter-Tribal Court. So she was originally in that action, is that right?

MR. HAGER: Yes, Your Honor. She's deceased now.

THE COURT: Okay. Well, tell me what the issue is here then.

MR. HAGER: So then the problem, Your Honor, is I agree with your analysis here that the council has the power to make that determination. And there's appellate review of that decision in terms of who is an enrolled member.

The defendants here agree who that council is. The special Minnesota Panel determined who that council is.

THE COURT: Right.

MR. HAGER: The problem is in this court, this BIA court then goes off in the direction of saying, well, but we're going to decide who the members are. And that doesn't follow, Your Honor. That's what the problem is.

[16] THE COURT: That's not really the way I read that decision. What that decision is saying is these people will submit the list of the people that

they believe are enrolled, and anyone that they agree on will be enrolled. And anywhere there's a dispute, will be subject to review. And I don't think there's anything wrong with that, because they would review it – and I think an Inter-Tribal Appellate Court has the right, whether it's a special Minnesota court or if it's the Inter-Tribal Court, has the right to review that determination, you know, on due process grounds and give them the right of a hearing, an opportunity to be heard, and notice of that hearing, in connection with anybody that claims they should have been on that list and they were excluded from that list.

That's all I read this decision to say. Why am I mistaken on that?

MR. HAGER: The reason you're mistaken, Your Honor, is that the council has the right to determine membership. They make that determination. Then, if someone wants to complain about that, they appeal. The appellate court doesn't make that initial determination, and the standard on appeal is abuse of discretion. They don't exercise the initial decisions on whatever standard they want to apply in terms of who is or is not a member at this point.

THE COURT: I thought that's what they were saying [17] in effect, is that the council gives us a certified list, and the only reason they say there's a dispute is because there's two councils here.

MR. HAGER: If they say, and what they're going to propose here today is that the council is going to make a determination with regard to who

the enrolled members are, and then anybody who wants to appeal that under the law that applies to that kind of determination, Your Honor, then that's fine.

THE COURT: Well, that's what should be done.

MR. HAGER: But that's not what the existing order is. The existing order is there's so much confusion and chaos there, that we're going to make that decision. They can't make a decision unless there's an appeal.

THE COURT: Let me shift over to opposing council. Do you agree on who the council is?

MR. KOCKENMEISTER: That's the question, Your Honor. There is no one out there, there is no body, there is no court, the BIA, no one has indicated or recognized what the appropriate council is. And that's what we're faced with, Your Honor. We're faced with –

THE COURT: But do you agree on who the council should be?

MR. KOCKENMEISTER: We don't. It's unclear that –

THE COURT: Well, Mr. Hager just got done saying the [18] two of you agreed on this.

MR. KOCKENMEISTER: I don't know, Your Honor, if I may, I don't know where he came up with that conclusion.

What we have suggested is that there is no legitimate council that's recognized by any body out there. There are two competing factions. They've each held their own elections, Your Honor. It's chaos. And what we're suggesting is that the first step is to determine who the appropriate enrolled legitimate members of the Winnemucca Indian Colony are. We have asked both sides to submit a list. We'll go through it and we'll make the determination as to who the legitimate members of the Winnemucca Indian Colony. After that –

THE COURT: When you say "both sides," you mean the two –

MR. KOCKENMEISTER: There are competing factions out there.

THE COURT: Now, just a second. You're talking about what you perceive to be two councils?

MR. KOCKENMEISTER: Well, they are alleging that there are two councils. We haven't made any determination as to who the appropriate council is, Your Honor. All we're saying is it came before us, we had two competing factions that are both are alleging – both held elections and both are alleging they are the legitimate council.

[19] Now, the plaintiffs in this case are relying on the Minnesota decision to assert that they are the legitimate council. If you read our decision closely, what we have stated is that we cannot determine

at this point in time who the legitimate council, who the le –

THE COURT: Let me ask this.

Since the parties agree to have the Minnesota council decide this issue, and that was agreed upon, right? I mean that was agreed?

MR. KOCKENMEISTER: It was agreed as –

THE COURT: And you don't waste the Ninth Circuit's time. And you're certainly not going to waste this Court's time.

MR. KOCKENMEISTER: And the issue that we had with that decision was we didn't see in the agreement that that was a binding final decision.

THE COURT: Well, put that aside for a second.

You agree that it was submitted for decision by that body?

MR. KOCKENMEISTER: It was submitted. That is correct.

THE COURT: All right. And that body made a decision. I, for the life of me, can't understand why the parties don't go on then and let that council designate who the enrolled members are. And then, to the extent [20] anybody has been excluded from that list, they have the right of appellate review to determine, based upon due process considerations, notice,

opportunity for a hearing, why they shouldn't be included. And then if they're successful on that, they're included, an election is held a short time thereafter, and whatever the results of that election are, when they're certified, that's it and everybody moves on with their life.

MR. KOCKENMEISTER: And that is very close to what we're suggesting.

THE COURT: What's the difference?

MR. KOCKENMEISTER: The difference is that –

THE COURT: You want to submit two lists?

MR. KOCKENMEISTER: – the Minnesota Panel was acting in place of the Inter-tribal Council Court of Appeals because it didn't exist –

THE COURT: What can you do – Right. I mean, what can you do?

MR. KOCKENMEISTER: Because it didn't exist –

THE COURT: That's basic fairness.

MR. KOCKENMEISTER: But, now, we still – they did not, for whatever reason, Your Honor, that decision did not resolve the dispute. For whatever reason, it didn't work. No one is recognizing any council at this point in time.

THE COURT: You see when that finally happens, [21] whether the Court wants to or not, out of necessity, it has to intervene.

MR. KOCKENMEISTER: That's our position, is that we're faced with –

THE COURT: I think the way they should intervene is to accept what the court in existence at the time said. And that is, here's your council. Go ahead and submit a list. You can conduct the election. But, before you conduct the election, anyone that wants to appeal to be included as a potential voter here, has the right to do that. And enough time should be allowed so they can do that before the election.

Now, that's basic fairness. What's wrong with that?

MR. KOCKENMEISTER: There's nothing wrong with it, but what we're suggesting is – we wanted to end this controversy as quickly as we possibly could and argue –

THE COURT: Why don't you all consent to let me end this as soon as possible then. I would be delighted to do that. I don't want to intervene. You know, this should all be resolved within the tribe, and it should all be resolved by the Inter-Tribal Appellate Court.

MR. KOCKENMEISTER: That's our position, is we would like to resolve that matter so that we can establish legitimate – if we went back, and if

you took the position that the Minnesota Panel was the appropriate decision, and [22] that's the council, then it would be back to us again because the dispute wouldn't end because the other faction –

THE COURT: Well, it would end because the other faction if they claim they're being left out, all they have to do is the people that they claim have not been entitled to be enrolled are not being enrolled, all they have to do is have those people, collectively, file with the Inter-Tribal Appellate Court or with tribal court, subject to appellate review, and there would have to be a built-in time frame for that, to have the matter heard so that they could be certified or not certified.

MR. KOCKENMEISTER: And that's exactly –

THE COURT: First what she should do is go to the council that's been designated by the Minnesota court, they should go to them. If they're refused, then they should have a reasonable period of time in which to take an appeal on that. And then if they're denied that, I think the only appellate review from that to this court would be on whether or not they were denied due process. I don't get involved in the other parts of it probably. I'm not sure. I would have to look at that.

But, what's not eminently fair about that?

MR. KOCKENMEISTER: It's not that it's not fair. We believe our solution is – it's going to get to

us, in our opinion, no matter – if the Tribal Council is as set forth by [23] the Minnesota Panel – and by the way, I'm not sure if the entire members are still around as Mr. Hager said, so you have a partial council that decides membership. We know that there's going to be a dispute. It's going to work its way through the system. Several years from now, we'll have the same issue before us.

THE COURT: How many people are we talking about?

MR. KOCKENMEISTER: I believe it's about – is it a 100 people in the colony?

MR. HAGER: Your Honor, the last list that was submitted in 1990 – and there's a long history of membership here and self-government successfully by this council –

THE COURT: How many people are we talking about?

MR. HAGER: We're talking about 99 on that list, Your Honor.

THE COURT: Ninety-nine people? Okay.

Ninety-nine people. And of the 99 people, how many – I realize I'm not binding anybody to this, how many do you pretty much concede are enrolled members and there's really no dispute over it, of the 99? Just give me a figure.

MR. HAGER: No dispute? Sixty, Your Honor.

THE COURT: So the dispute is over 39 people, right, approximately?

MR. HAGER: That's approximately correct.

THE COURT: Okay.

[24] MR. KOCKENMEISTER: And I would like to add, Your Honor, we had a –

THE COURT: Okay. Couldn't that be resolved fairly simply? We're not talking about thousands and thousands. If they can decide a national election –

MR. KOCKENMEISTER: You're absolutely right. That's our position, Your Honor. We have those lists. We've asked the parties to submit the lists. We've submitted – we have a list of the disputed individuals. Now all we would like to do is now hold a hearing on those disputed individuals and make a determination as to whether they're legitimate members of the Winnemucca Indian Colony and hold the election. We think that's the quickest and fairest way of resolving this dispute.

Under the use of the Minnesota –

THE COURT: Why don't you simply stipulate that the council that was established by the Minnesota Panel – and you could do this before the Inter-Tribal Court, rather than having this court take some type of extraordinary action, which I'm not inclined to do – simply stipulate that for purposes of getting this matter before the court, moving it

forward, that that council would be the council that would make the initial determination with respect to those who are enrolled members and entitled to vote.

The parties would further stipulate that to the extent there are any that are not included on that list who [25] wish to vote, believe they should be enrolled members, their names would be certified for immediate appellate review to the Court of Appeals, the Inter-Tribal Court of Appeals, with an opportunity for a hearing and a decision as to whether or not they should be enrolled members to vote. And that that process should be completed within, say, 30 days or 60 days.

MR. KOCKENMEISTER: Your Honor, I think, essentially, we've already done that because they've submitted a list based on what they believe are the appropriate members. The other side has submitted a list where they believe these individuals should be included as members.

THE COURT: That's where you're down to the 39 that are in dispute?

MR. KOCKENMEISTER: Right. We have that information already. All we now want –

THE COURT: Counsel, do you agree with that or not?

MS. HEARNE: (Shakes head negatively.)

THE COURT: You said you thought there were 39 in dispute. He thinks there's 39 in dispute.

Why can't everybody move forward to let – if you need a certification from this original council, fine, certify it, and then that would be the trigger for the Inter-Tribal Court of Appeals to give an opportunity for a hearing to these 39 that claim they've been disenfranchised.

[26] MS. HEARNE: I believe it's because some people who want to be members who are not on that list, who would have the right then to file their application for membership with the council, and those people are the ones who have never been members who want to file an application.

THE COURT: That's fine. Let them file it. Let them file it and let the court review that.

MR. KOCKENMEISTER: We have no problem. We just want –

THE COURT: So let's do it. Why can't it –

MS. HEARNE: It has to be filed with the council so they can re –

MR. HAGER: So long as it's filed with the council, Your Honor. The council makes the determination that –

THE COURT: Fine. I'm saying stipulate so it can be filed with the council. This council is not going to do anything other than just probably rubber-stamp whatever they want to rubber-stamp, but then you get it into the court. That's all I'm trying to do.

Why can't you stipulate to do that? Go back to the Inter-Tribal Court, indicate the parties – because you can stipulate to what you want – that the parties have stipulated that the council that was designated – the parties agree that the council that was designated through this hard work of this Minnesota Panel, will make the initial [27] certification of those who are the enrolled members, and any of the group that you're talking about who feel they should be. And that the ones that are, that the council – and the council is probably going to at least confirm those that you all agree on. There will be that one list. The second list will be those that are not agreed, and they won't certify those.

And then there would be a period of time, I would think something in the neighborhood of 30 days or whatever would be a reasonable period of time for you to stipulate, that they would have the right, those who claim they're disenfranchised, or claim they should be enrolled and are not, would have the right to file an appeal with the Inter-Tribal Court of appeals, and with appropriate notice and an opportunity to be heard, the decision would be made by the Inter-Tribal Court of Appeals as to whether or not they're entitled to vote and be enrolled. Then at that point, that decision, I suppose, could be appealed to this court.

Now, I'm not going to give you an advisory opinion now on what the breadth of my authority would be, whether it's simply to determine whether due process has been met here, or whether or not I have

the right to go in and make a determination as to who should be enrolled and who's not. I'm not sure at that one. I haven't looked at the law in the area.

[28] But in any event, after that process, after that appellate period has expired, then there would be a definite date set for election, and those who are enrolled pursuant to law would be entitled to vote, period. They'll vote. Whoever they vote on, that's the council and you can move on.

What's wrong that?

MR. HAGER: That sounds good. If I could have one moment, Your Honor.

THE COURT: Do you see a problem with that?

MR. KOCKENMEISTER: I don't see a problem. The only issue is that we've interjected another step in the process because we already know who –

THE COURT: But if that makes everybody happy, why not do it?

MR. KOCKENMEISTER: I'm okay with it. All I'm saying is –

THE COURT: It's not a step that's going to hurt anybody.

MR. KOCKENMEISTER: – we know who the disputed individuals are already.

THE COURT: That gives a little support, anyway, to the hard work these people in Minnesota did. I'm impressed with all the work they put in on this. And it cost – I don't know how much that cost, but I'll bet it was twenty, thirty, forty thousand dollars.

[29] MR. KOCKENMEISTER: It's a significant amount of money, Your Honor.

MS. HEARNE: Thirty-four thousand dollars.

THE COURT: That was my recollection that it was in the thirty thousand dollar range. That's not the barometer on which we decide whether a decision is a good one or not, but certainly everybody had agreed to do that. It's time to move on. We make agreements. We're bound by them. And we move on.

MR. KOCKENMEISTER: We don't have a problem. We just believe it's our responsibility to ultimately determine disputes over tribal membership. And I think it's clear that it's our responsibility.

THE COURT: What's your problem with that resolution?

MR. HAGER: I don't have a problem with that resolution. In response to what was just said, there is no dispute right now regarding membership, because membership has not yet been determined. So once the membership is determined, then I think the comments here might be appropriate. But, it's inappropriate to anticipate there's going to be a dispute,

and since there may be one in the future, we'll just take control of that decision now. That's the problem we have with the decision.

MR. KOCKENMEISTER: Your Honor, I beg to differ with [30] that. There is –

THE COURT: Well, could I have you go back then to the Inter-Tribal Court of Appeals and request that they re-open the matter and allow you, on your stipulation, to proceed as I've just outlined it for you? Would you be willing to do that?

MR. HAGER: Yes, we would, Your Honor.

THE COURT: Would you be willing to do that?

MR. KOCKENMEISTER: We have no problem. If they would be stipulating with the other, quote, competing faction in this matter, we don't have a problem with that. We just -if I hear the Court correctly, you believe it's our responsibility to determine disputes with respect to tribal enrollment. And we agree wholeheartedly. And if this is the procedure –

THE COURT: What I've said is this: That it's my opinion, if you look at the Articles, if you look at the Constitution, that it's the responsibility first of the council to make that determination. Unfortunately, there's a huge question about that as to who is the real council.

It's my opinion that the Minnesota Panel did a fine job in trying to resolve that, but it didn't get resolved. So, I'm saying the first opportunity should be given, on the certification question to try to comport with what the [31] constitution says, to let that council; that is, the council that was denominated here, absent William Bills, who isn't around –

MR. KOCKENMEISTER: And a deceased person as well.

THE COURT: And a deceased person. So at least you have a body doing something that's consistent with the Constitution there, they'll make the certification. There will also be this list of people, either those who are enrolled that claim they've been disenfranchised, or those who want to be enrolled –

MR. KOCKENMEISTER: To be enrolled, right.

THE COURT: – that list would be made available, and that they would, and they could do it collectively, have the right to take an appeal, with an opportunity for notice and hearing then before the Inter-Tribal Court of Appeals for a determination as to whether or not they should be permitted to be enrolled and, therefore, to vote.

That's what I'm suggesting.

MR. KOCKENMEISTER: And –

THE COURT: That would be the process. And the time frame you can work out in your stipulation so that it's reasonable.

MR. KOCKENMEISTER: And –

THE COURT: And I would think the Court of Appeals would go along with that.

[32] MR. KOCKENMEISTER: We would. And to make the process simple, perhaps if there's a recognition that we would retain jurisdiction over this matter until the process as you've described is worked out, that would be our suggestion, rather than –

THE COURT: Well, I think you have jurisdiction over it, so I think you would retain jurisdiction over it. I think this court has the right to review what you do, but probably on a fairly limited basis. I don't want to intrude on what the council does, and I don't want to intrude on what your court does because those are things that should be left to the tribe. They should be left to the colonies. They should be left to the business of the Winnemucca Indian colony, in my opinion.

The Federal District Court does not want to get involved in these matters except as a last resort. So, I don't want to precipitously move in and tell everybody how they have to do things. But, everybody out there is entitled to have a fair election. And the fairest kind of election I can think of is where everybody has a right to vote that has the right to be enrolled, and they should have an opportunity and a hearing

ultimately, since there's, you know, it's questionable about the council, ultimately before the Inter-Tribal Court of Appeals.

MR. KOCKENMEISTER: Your Honor, we agree with that.

[33] Our concern in coming here today as defendants, was the assertion, we thought by the plaintiffs, that we didn't have jurisdiction at all to decide enrollment membership. And that gets to the heart of –

THE COURT: Well, my understanding of what they were contending is that the council should have the right to say first who the parties are. And I think they're right on that. That's the way I read everything here.

MR. KOCKENMEISTER: I won't – ultimately, it's going to get to our court, I feel. And as long as we have the right to review those decisions, I'm comfortable with the stipulation that you suggested that the parties enter into, Your Honor.

THE COURT: Should we just continue – what I'm going to do is deny the application for preliminary injunction without prejudice. The parties understand they can come back in here, you know, on appropriate notice, and I'll try to get an expedited hearing on it if we need to.

I'm going to allow you to go ahead then and work out the stipulation. You can get a copy of the transcript if you want to do that. I think it's fairly clear what we're talking about here.

So, the process simply would be that you agree that those parties who are still alive that constitute the board that was designated by the Minnesota Panel, should [34] first review all of these matters of people who claim they're entitled to vote and be enrolled; either the ones who are outside and want to be in, or those who are in and claim they aren't – that they're being disenfranchised. And then there should be a certification as to those that the council believes should be entitled to vote, they're enrolled.

And then as to the balance of them, they should collectively have the right to take an appeal to the Inter-Tribal Court of Appeals, and have appropriate notice, an opportunity for a hearing to present the issues that they have to present, and then that Inter-Tribal Court of Appeals would make the decision as to whether or not they're entitled to vote.

Then if somebody maintains that they've not been given due process, and that they therefore have some right to appeal to this court, I'm going to leave this action open for purposes of allowing them to come in on that basis. And if that delays the election, it will delay it. Otherwise, the Inter-Tribal Court of Appeals then, once that decision is made, then I think that council can go ahead and set the date for the new election.

And I don't think the court should be setting dates for elections and everything else. I think that ought to be up to a council. But, I agree with you that there should be that mechanism available so that the

council doesn't stonewall [35] anyone from have the right of having the matter heard by the Inter-Tribal Court of Appeal.

MR. HAGER: I don't disagree, Your Honor.

THE COURT: All right. Any question by either side?

MR. KOCKENMEISTER: Your Honor, I'd like to, if I may briefly, throughout the pleadings in this matter, the theme is that somehow the Inter-Tribal Court of Appeals is the pawn of the Bureau of Indian Affairs. We may be back –

THE COURT: Let me talk about that just for a minute.

You know, I complimented the Minnesota Panel for what they did and, frankly, in reading the decision and order on appeal from the Inter-Tribal Court of Appeals, it looked to me like they, in good faith, were doing a fine job of trying to resolve a very, very difficult problem.

MR. KOCKENMEISTER: And I think –

THE COURT: I'm well aware how difficult that problem is, Judge Cooke and I both, in connection with earlier proceedings here.

MR. KOCKENMEISTER: And I just want to state for the record, as an officer of this court, no one from the BIA contacted any of the three judges on this panel and suggested that we had to enter a decision in any way or form. We are totally independent.

And I just wanted to make sure that the integrity of the Inter-Tribal Court of appeals –

[36] THE COURT: Sure.

MR. KOCKENMEISTER: – is not maligned in this case.

THE COURT: Sure. Well, that's fine.

There is one thing that's very troubling to me about all of this. I can't, for the life of me, understand why there wouldn't be adequate funding out there to keep a court of appeals alive and well, so that it can decide these issues. And to the extent the BIA doesn't fund something like that, I think that's a travesty.

MR. KOCKENMEISTER: And, Your Honor, I don't disagree with you. I came – I'm the new wave, if you will. And I can tell you that the justices are committed to having a strong and independent appellate court. Obviously it does depend on funding from the BIA, which we don't have any control over.

THE COURT: Well, I know. And to the extent my words mean anything, they should always fund something like that. Everybody has the right to go into court. Everybody has the right to an appellate review. And everybody in the colony should have that right. And they should have as much of a right as anybody else in the United States to come into court and have their grievances resolved. And to the extent the BIA or anybody else disenfranchises somebody from not being able to go and do that – I mean, heaven help us if all the funding is cutoff from the

courts in this country so [37] people don't have some right to assert and protect their constitutional rights.

MR. HAGER: And we appreciate that, Your Honor.

THE COURT: All right. Thank you very much. I appreciate it. Thank you, counsel.

MR. HAGER: Thank you, Your Honor.

MS. HEARNE: Thank you, Your Honor.

THE COURT: We're in recess.

(Court Adjourned.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kathryn French — 1-10-05

KATHRYN M. FRENCH, RPR, CCR — DATE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BANK OF AMERICA, N.A., a Delaware corporation, Plaintiff, vs. WILLIAM BILLS, ET AL., Defendants.	CV-N-00-0450-HDM (VPC) **REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE** February 13, 2003

This Report and Recommendation is made to the Honorable Howard D. McKibben, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants Thomas Magiera (deceased), Thomas Wasson, Elverine Castro and Andrea Davidson's (the "Wasson group") motion for summary judgment (#147). Defendants William Bills (an originally named defendant in this action), Allen Ambler, Charlene Dressler, Linda Ayer, Clorinda (Toni) George and Lovelle Brown (the "Bills group") opposed (#151). The Wasson group replied (#153). The parties have additionally filed supplemental points and authorities pursuant to this court's order of November 25, 2002 (#157) (Wasson group (#163); Bills group (#165)). The court has thoroughly reviewed the record and the parties' motions and supplemental briefs and finds that defendant Wasson group's motion for summary judgment (#147) should be dismissed without prejudice as premature.

I. BACKGROUND & PROCEDURAL HISTORY

Plaintiff, Bank of America, N.A. ("Bank of America"), filed this interpleader action based upon conflicting claims as to who has authority to use an account opened in the name of "Winnemucca Indian Colony" (#1). The dispute arises because two groups claim to be the rightful tribal council of the Winnemucca Indian Colony ("WIC"), both arguing they are entitled to use the bank account funds.

Bank of America filed its complaint in interpleader on August 28,2000 (#1). The Wasson group answered on October 10, 2000 (#13). The Bills group answered on December 18, 2000 (#23). Bank of America was dismissed on June 7, 2001, depositing the contested funds with the court (#82). Although this case has an extremely lengthy factual history, the following is a brief history of the facts relevant to this motion.

As of February 21, 2000, the members of the WIC tribal council were Chair Glenn Wasson, Vice Chair William Bills, and members Thomas Wasson, Elverine Castro, and Lucy Lowery (#147). Glenn Wasson was murdered on February 22, 2000. *Id.* Subsequently, the Colony Council split into two factions: (1) Vice Chair Bills claimed to be the acting chair of the tribal council; and (2) members Thomas Wasson, Elverine Castro, and Lucy Lowery claimed to be the majority of the tribal council. Each faction purports to be the official tribal council of the WIC and both groups have taken action on behalf of the colony. *Id.*

Each group has held separate elections which have not been recognized by the, other group. *Id.* Each group recognizes a different tribal judge on the tribal court. *Id.*

The tribal court case deciding who constitutes the tribal council was considered by the Inter-Tribal Court of Appeals of Nevada in February 2001 (#126). However, the appellate court remanded the case back to the tribal court because the case lacked a record for appeal. *Id.* The appellate court obtained an agreement from the parties that they would jointly appoint a mutually acceptable *pro tem* tribal court judge. *Id.* *Pro tem* Judge Steven Haberfeld was directed to answer three specific factual questions: (1) the names of the members of the Winnemucca Indian Colony who are eligible for enrollment; (2) the identity of the proper and legitimate members of the Winnemucca Colony Council; and (3) the identity of the Winnemucca Tribal Court judge. *Id.*

Judge Haberfeld held several days of hearings in 2001 and 2002 and rendered his decision on May 9, 2002. *Id.* Judge Haberfeld found that neither group was the legitimate Winnemucca Colony Council, and he ordered that a new tribal council election take place in October 2002. *Id.*

Each side subsequently appealed Judge Haberfeld's May 9, 2002 decision. Normally, such appeals would go back to the Inter-Tribal Court of Appeals for Nevada, which is under contract with the Bureau of Indian Affairs to provide an appellate court to tribes

in Nevada (#163). However, due to lack of funds, this court was dismantled sometime after the February 2001 appeal of the first tribal court decision. *Id.* Thus, there was no court to hear the appeal. *Id.* The parties took it upon themselves, with the help of the Ninth Circuit mediation program, to stipulate to a Court of Appeals consisting of a three-judge panel to hear the appeal. *Id.* The parties agreed on three judges from Minnesota, all with backgrounds in tribal law, to hear the appeal. *Id.* The stipulated Court of Appeals held oral arguments on July 24, 2002 (#147). The court rendered its decision on August 16, 2002, reversing Judge Haberfeld's May 9, 2002 opinion. *Id.* Specifically, in regards to the tribal council, the stipulated Court of Appeals found that the WIC tribal council consisted of Sharon Wasson, Thomas Wasson, William Bills, Elverine Castro, and a vacancy due to the death of Thomas Magiera. *Id.* Andrea Davidson was subsequently appointed to fill this vacancy. *Id.*

II. DISCUSSION

The Wasson group argues in their motion for summary judgment that the sole issue remaining in this case, the determination of which parties are entitled to the disbursement of the Bank of America funds, has now been decided by the stipulated Court of Appeals (#147). Based on the August 16, 2002 decision by the stipulated Court of Appeals, the Wasson group requests that the court grant summary judgment in favor of these parties and disburse the funds. *Id.*

The Bills group contends in their opposition to motion for summary judgment (#151) and supplemental brief (#165) that the tribal court process is not yet complete and summary judgment should therefore be denied. At the heart of this contention is the Bills group's argument that the stipulated Court of Appeals lacked subject matter jurisdiction to hear the case (#165). The Bills group further argues that the creation of this court was in violation of the WIC code and constitution. *Id.* The Bills group contends that it has further avenues of appeal within the tribal court process and that this court cannot grant summary judgment until the jurisdictional issue and the larger decision of who constitutes the tribal council has been decided with finality. *Id.*

The Wasson group replies that they entered into the stipulation for the Court of Appeals in good faith and with the intention that it would be the final avenue of appeal (#153, #163). The Wasson group argues that the doctrines of judicial estoppel and good faith mandate that the court recognize the agreement for the stipulated Court of Appeals. *Id.* The Wasson group alleges that the Bills group is acting in bad faith by challenging the subject matter jurisdiction of the stipulated Court of Appeals. *Id.*

The way in which this case had advanced procedurally has created disorder and confusion. The court finds that the facts regarding how the attorneys in this case have conducted themselves are disturbing, but will address this in a subsequent order. Despite the allegations of bad faith and the doctrine of judicial

estoppel, for the reasons stated below, the court must dismiss the Wasson Group's motion for summary judgment (#147) as premature.

A. Summary Judgment Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial responsibility of identifying the absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986); *Zoslaw v. MCA Distr. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). For this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Baker v. Centennial Ins. Co.*, 970 F.2d 660, 662 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

> [T]here is no genuine issue of fact for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id. at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978). Moreover, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

B. Tribal Self-Determination

1. Tribal Self-Government

The Supreme Court has "repeatedly recognized the federal government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (*citing Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144, and n. 10 (1980); *Williams v.*

Lee, 358 U.S. 217, 220-221 (1959)). "Tribal courts play a vital role in tribal self-government." *Iowa Mut.*, 480 U.S. at 14.

The Ninth Circuit found that it is "deeply rooted" in Supreme Court precedent that federal courts must afford tribal courts deference "concerning activities occurring on reservation land." *U.S. v. Plainbull*, 957 F.2d 724, 727 (9th Cir. 1992) (*citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Deference to tribal courts concerning intra-tribal affairs or internal matters is a fundamental tenet of federal jurisprudence. *Plainbull*, 957 F.2d at 727; *see also U.S. Bancorp v. Ike*, 171 F.Supp.2d 1122, 1125 (D. Nev. 2001) (holding that a tribal election dispute was solely a matter of tribal law and the federal court had no jurisdiction to determine which group was the governing body of the tribe).

Other circuits addressing this issue have found similarly. *Wheeler v. United States*, 811 F.2d 549 (10th Cir. 1987) (the federal courts have stated that when a dispute is an intra-tribal matter, the federal government should not interfere); *Shenandoah v. United States Dept of the Interior*, 159 F.3d 708, 712-13 (2nd Cir. 1998) (holding that a federal court did not have jurisdiction to determine which member of the Oneida Tribe was the proper tribal representative, as the question involved purely intra-tribal law); *Rosebud Sioux Tribe of South Dakota v. Driving Hawk*, 534 F.2d 98, 100 (8th Cir 1976) (holding that federal courts cannot be used to supervise and decide issues that arise in tribal elections); *Kishell v. Turtle Mountain*

Housing Authority, 816 F.2d 1273 (8th Cir. 1987) (finding a purely internal tribal controversy was involved and the court lacked jurisdiction to hear it); *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985) (holding that resolution of disputes involving questions of interpretation of the tribal constitution and tribal law was not within the District Court's jurisdiction).

Although this court has jurisdiction over the interpleader case, this court does not have jurisdiction to decide the dispute over who the members of the tribal council are. *U.S. Bancorp v. Ike*, 171 F. Supp.2d 1122, 1125 (D. Nev. 2001). Deciding the question of who constitutes the tribal government is solely a matter of tribal law. *Id.*; *Shenandoah*, 159 F.3d at 712-13; *Rosebud Sioux Tribe*, 534 F.2d at 100; *Boe v. Fort Belknap Indian Cmty. Of Fort Belknap Reservation*, 642 F.2d 276, 278 (9th Cir. 1981) (distinguishing a habeas remedy as a proper use of the federal court, from interference with tribal elections as an improper use).

2. Tribal Exhaustion Doctrine

The rule of tribal exhaustion requires that federal courts give precedence to tribal courts by affording them a full and fair opportunity to determine the extent of their own jurisdiction over a claim. *National Farmers Union Ins. Co. v. Crow*, 471 U.S. 845 (1985); *Iowa Mut.*, 480 U.S. 9. The general principle is easily stated: "Parties who challenge, under federal law, the

jurisdiction of a tribal court to entertain a cause of action must first present their claim to the tribal court before seeking to defeat tribal jurisdiction in any collateral or parallel federal court proceeding. *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 65 (2nd Cir. 1997). The rule of tribal exhaustion is not jurisdictional, but rather is a "prudential" rule, pursuant to which a federal court, in view of comity considerations, "should stay its hand 'until after the tribal Court has had a full opportunity to determine its own jurisdiction.'" *Strate v. A-I Contractors*, 520 U.S. 438, 449 (1997) (*quoting National Farmers*, 471 U.S. at 857). While this rule does not present a jurisdictional bar, the court has discretion to raise the issue of comity *sua sponte*. *United States of America v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996).

Although this doctrine is "subject to a number of exceptions, tribal courts ordinarily have the first opportunity to determine the extent of their own jurisdiction." *AT&T v. Coeur D'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002). These exceptions, set out in *Nevada v. Hicks*, preclude tribal exhaustion: (1) where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) where the action is patently violative of express jurisdictional prohibitions; or (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (*citing National Farmers*, 471 U.S. 845).

In the Ninth Circuit, numerous cases have discussed the issue of tribal exhaustion. *Allstate Indem. Co. v. Stump*, 197 F.3d 1071, 1073 (9th Cir. 1999) (we begin with the general rule that a party may not sue in federal court to challenge tribal court jurisdiction until it has first exhausted its remedies in tribal court); *Burlington North Railroad Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991) ("under the Supreme Court's ruling in *National Farmers Union*, 'the federal court should *not even make a ruling on tribal court jurisdiction* . . . until tribal remedies are exhausted'"); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987). Other Circuits have also weighed in on these issues. *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 991 (8th Cir. 1999) (holding that a party must exhaust his or her tribal remedies before a federal court can consider the case); *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991) (holding that, as a matter of comity, federal courts should not entertain a challenge to the jurisdiction of a tribal court until tribal court remedies have been exhausted); *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 65 (2nd Cir. 1997).

In *Basil Cook Enterprises*, the District Court dismissed a contractual dispute between tribal members and the tribe pending exhaustion of tribal remedies. *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 63 (2nd Cir. 1997). The plaintiff tribal members challenged the District Court's dismissal. *Id.* The plaintiffs argued that there were no tribal remedies to exhaust because the tribal court

was a nullity, since it had been created in contravention of the tribe's laws and constitution. *Id.* In affirming the District Court, the Second Circuit stated

> First, to hold that the St. Regis Mohawk Tribal Court is a nullity under the tribal constitution would require this court to construe tribal law. This we may not do. The Supreme Court has long recognized the exclusive responsibility of Native American tribes to construe their own law, *see Talton v. Mayes*, 163 U.S. 376, 385 (1896); *see also Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985); *R.J Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 983 (9th Cir. 1983), and with that responsibility comes the parallel responsibility of federal courts to abide by those constructions, *see Hinshaw v. Mahler*, 42 F.3d 1178, 1180 (9th Cir. 1994). Federal courts, as a general matter, lack competence to decide matters of tribal law and for us to do so offends notions of comity underscored in *National Farmers*.

Id. at 65.

At a minimum, the exhaustion rule requires that tribal appellate courts have the opportunity to review determinations of the lower tribal courts. *Iowa Mut.*, 480 U.S. at 17. Once tribal remedies are exhausted, the federal district court has jurisdiction under either 28 U.S.C. § 1331 (federal question jurisdiction) or 28 U.S.C. § 1332 (diversity jurisdiction) to review the tribal court's finding of tribal jurisdiction. *Strate*, 520

U.S. at 451; *see also Tillett v. Lujan*, 931 F.2d 636, 641 (10th Cir. 1991).

As a general rule, federal courts must recognize and enforce tribal court decisions under principles of comity. *AT & T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002) (*citing Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997)). However, this is subject to two exceptions. In *Coeur D'Alene*, the court stated "two circumstances preclude recognition: when the tribal court either lacked jurisdiction or denied the losing party due process of law." *Coeur D'Alene Tribe*, 295 F.3d at 904. Additionally, once the federal court recognizes the tribal court decision

> [t]he federal courts may not readjudicate the questions- whether of federal, state or tribal law- already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other reason.

Id.

C. Subject Matter Jurisdiction

As a matter of federal law, subject matter jurisdiction cannot be waived, *Intercontinental Travel Marketing, Inc. v. F. D. I. C.*, 45 F.3d 1278, 1286 (9th Cir. 1994). Lack of subject matter jurisdiction may be raised at any time by any party. *In re Kieslich*, 258 F.3d 968, 970 (9th Cir. 2001). The doctrines of judicial estoppel and waiver do not apply to subject matter

jurisdiction determinations. *Intercontinental Travel*, 45 F.3d at 1286.

Although it seems patently unfair, a party who has invoked the jurisdiction of a federal court but who is unhappy with the result will be allowed to challenge the jurisdiction at a later stage of the proceedings. *American Fire & Cas, Co. v. Finn*, 341 U.S. 6 (1951); *Santos v. Alaska Bar Ass'n*, 618 F.2d 575 (9th Cir. 1980). The intentional failure to raise the jurisdiction questions at the beginning of the lawsuit is reprehensible, however, the remedy for this conduct would be disciplinary action by the court rather than assumption of subject matter jurisdiction. *Page v. Wright*, 116 F.2d 449, 455 (7th Cir. 1940) *certiorari dismissed*, 312 U.S. 710 (1941).

III. ANALYSIS

There are two issues involved in deciding how to resolve the motion for summary judgment pending before this court (#147). The first issue is which group constitutes the Winnemucca Indian Colony tribal council. As further explained below, this issue is not something that this court can decide due to federal case law and policy recognizing the extreme importance of tribal self-determination. The second issue is whether the stipulated Court of Appeals had jurisdiction to hear the appeal of Judge Haberfeld's May 9, 2002 tribal court decision. This court finds that the jurisdictional question is a genuine issue of material fact, and therefore, cannot grant summary judgment.

However, this court presently is not the correct forum to decide the jurisdictional question. As further explained below, under the doctrine of tribal exhaustion, this court must defer to the tribal court process before it may address the issue of whether the stipulated Court of Appeals had the jurisdiction to hear the appeal.[1]

A. Subject Matter Jurisdiction Over This Case

This court has retained jurisdiction over the interpleader case despite the fact the that plaintiff Bank of America has been dismissed and all of the remaining defendants in the case lack diversity of citizenship (#90). This court currently holds the Bank of America funds at issue (#82).

---

[1] The court would like to note the issues it will not be addressing, despite the many arguments the parties have made to this court. First, this court will not resolve issues of the WIC membership list. Allegations of due process violations and illegal exclusion from the WIC are not within this court's jurisdiction under the law of the case (#90). Second, this court will not address which judge is the official tribal court judge. Third, this court will not resolve whether the many elections held by the different groups during this long process are legal under the WIC constitution. Finally, this court will not address whether the parties are or are not complying with the August 16, 2002 decision by the stipulated Court of Appeals. None of these issues is presently before the court under the law of this case (#90). All of these issues are matters of internal tribal law and this court cannot decide such conflicts, If the parties need redress for any of the above grievances, they must go to the tribal court for relief.

B. Tribal Self-Government

The sole issue in this case is which parties are entitled to the Bank of America funds. This case was limited to one issue by the District Court's minute order of August 2, 2001 (#97) and by this court's order of February 12, 2003 dismissing all cross-claims and counter-claims (#167). To resolve the interpleader case, this court must determine the issue of which parties have access to the Bank of America funds. The determination of who has access to the money is dependant upon a resolution of which group constitutes the legal WIC tribal council.

Thus, the first issue is whether this court may decide who constitutes the tribal council. Deference to tribal courts concerning intra-tribal affairs or internal matters is a fundamental tenet of federal jurisprudence. *Plainbull*, 957 F.2d at 727; *see also U.S. Bancorp v. Ike*, 171 F.Supp.2d 1122, 1125 (D. Nev. 2001) (holding that a tribal election dispute was solely a matter of tribal law and the federal court had no jurisdiction to determine which group was the governing body of the tribe); *Wheeler v. United States*, 811 F.2d 549 (10th Cir. 1987) (the federal courts have stated that when a dispute is an intra-tribal matter, the federal government should not interfere); *Shenandoah v. United States Dep't of the Interior*, 159 F.3d 708, 712-13 (2nd Cir. 1998) (holding that a federal court did not have jurisdiction to determine which member of the Oneida Tribe was the proper tribal representative, as the question involved purely intra-tribal law).

A resolution of who constitutes the tribal council is a matter of internal tribal controversy between tribal members. The court finds that this issue concerns intra-tribal matters because the controversy solely involves tribal members and tribal funds, and the activities surrounding the controversy occurred solely on tribal land. An intra-tribal controversy is not something the federal court is able to decide. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *U.S. v. Plainbull*, 957 F.2d 724, 727 (9th Cir. 1992); *U.S. Bancorp v. Ike*, 171 F.Supp.2d 1122 (D. Nev. 2001). Thus, policies of tribal self-government and self-determination require that this court abstain from making any rulings related to the tribal council members. *U.S. Bancorp*, 171 F.Supp.2d 1122.

C. Tribal Exhaustion

When the court received the stipulated Court of Appeals decision, it seemed as though parties had settled, and that the wait to disburse the money was over (#147). However, despite all of the time and money spent by the parties, it appears that they are determined to prolong this process. The Bills group has challenged the subject matter jurisdiction of the stipulated Court of Appeals even though the Bills group fully participated in the negotiations to have the appeal heard before that forum. After the stipulated Court of Appeals rendered an unfavorable decision to the Bills group and after payment of $30, 847.32 to the stipulated Court of Appeals for its services (#155), the Bills group now raises for the first

time the issue of subject matter jurisdiction. Notwithstanding this troubling turn of events, federal case law indicates that subject matter jurisdiction may be challenged at any step of the court process.

Under the doctrine of tribal exhaustion, federal courts must "stay their hand" until tribal courts have had the opportunity to determine their own jurisdiction. *National Farmers Union Ins. Co. v. Crow*, 471 U.S. 845 (1985). At a minimum, the exhaustion rule requires that tribal appellate courts have the opportunity to review determinations of the lower tribal courts. *Iowa Mut. Ins. Co v. LaPlante*, 480 U.S. 9, 17 (1987). Once tribal remedies are exhausted, the federal district court has jurisdiction to review the tribal court's finding of tribal jurisdiction. *Strate*, 520 U.S. at 451.

In *U.S. Bancorp*, two groups were vying to be declared the governing body of the Te-Moak Tribe. *U.S. Bancorp v. Ike*, 171 F.Supp.2d 1122 (D. Nev. 2001). The District Court found that it did not have jurisdiction to decide which group was the governing body of the Te-Moak. *Id.* at 1125. However, the District Court held that it did have jurisdiction, *prior* to the exhaustion of tribal remedies, to determine whether the Court of Indian Offenses, which the Te-Moak Tribe used as a tribal court, had exceeded its jurisdiction in issuing a restraining order against one of the groups. *Id.* The District Court based its holding on the fact that the Court of Indian Offenses is a federal "C.F.R." court, established and administered by the Bureau of Indian Affairs. *Id.* Although the Te-Moak Tribe had

adopted the C.F.R. court into its constitution, the C.F.R. court retained federal aspects. These federal aspects, the District Court held, gave it jurisdiction to examine the C.F.R court's jurisdictional limits prior to tribal exhaustion. *Id.* The District Court found that had the C.F.R. court instead been purely a tribal court set up and run by the tribe with no federal government interference, the District Court would have had no jurisdiction to review the tribal court's jurisdiction prior to the exhaustion of tribal remedies. *Id.*

U.S. Bancorp is illustrative of the present case before the court. In the current case, the WIC tribal court is not a C.F.R. court, but is purely a tribal court, set up and run by the tribe. There is no federal interference or assistance running the WIC court. Thus, *U.S. Bancorp* is further evidence that this court does not have jurisdiction to examine the jurisdictional limits of the tribal court prior to the exhaustion of tribal remedies. This court must allow the tribal court process to complete itself, absent exceptions to the rule of tribal exhaustion, before it may determine whether the stipulated Court of Appeals had jurisdiction to hear the appeal.

The question now becomes whether the tribal remedies have been exhausted. If tribal remedies have been exhausted, this court has jurisdiction to review the jurisdiction of the stipulated Court of Appeals. The Wasson group argues that the tribal court process is complete since the parties stipulated to a final and binding Appellate Court decision (#163). The Bills group contends that parties can

never stipulate to the subject matter jurisdiction of a court where there is none (#165).[2] The Bills group further contends that it has numerous avenues of appeal such as: (1) a petition for re-hearing before the stipulated Court of Appeals on whether it had jurisdiction; (2) a ruling by the "correct" appellate court, the Inter-Tribal Court of Appeals of Nevada, on whether the stipulated Court of Appeals had jurisdiction; and/or (3) a ruling by the Inter-Tribal Court of Appeals of Nevada on the merits of the appeal, nullifying the work of the stipulated Court of Appeals entirely. *Id.*

In *Basil Cook Enterprises*, the plaintiff tribal members argued that there were no tribal remedies to exhaust because the tribal court was a nullity, since it had been created in contravention of the tribe's laws and constitution. *Id.* The court stated

> First, to hold that the St. Regis Mohawk Tribal Court is a nullity under the tribal constitution would require this court to construe tribal law. This we may not do. The Supreme

---

[2] The court notes that the Bills group has cited to many federal practice treatises in their opposition (#151) and supplemental brief (#165) and that these general rules regarding the challenge to subject matter jurisdiction are only applicable to the federal courts. The same rules may not be applicable to the WIC tribal court system. However, while tribal law may have different rules concerning subject matter jurisdictional challenges, it has not been brought to this court's attention, and this court will not engage in the interpretation of the WIC constitution and code.

> Court has long recognized the exclusive responsibility of Native American tribes to construe their own law . . . and with that responsibility comes the parallel responsibility of federal courts to abide by those constructions.

Id. at 65.

Like the plaintiffs in *Basil Cook Enterprises*, the Bills group contends that the stipulated Court of Appeals is a nullity because the court was contravened in violation of the WIC code and constitution (#165). However, like the court in *Basil Cook Enterprises*, this court cannot find that the stipulated Court of Appeals is a nullity since such a finding would require this court to interpret tribal law. The question of whether the stipulated Court of Appeals was convened properly under the WIC code and constitution are tribal law issues. Additionally, this court cannot rule on the jurisdiction of the stipulated Court of Appeals while tribal remedies remain.

Despite the fact that the court is loathe to let this process continue, especially considering the circumstances in which the partes have now managed to prolong the proceedings, the court finds that the tribal process has not been exhausted. While this court wonders whether this jurisdictional challenge would be brought had the Bills group won its case, the court reluctantly agrees that there are a few avenues of appeal left within the tribal court process. Whether those avenues of appeal are the proper ones procedurally is a question of tribal law, and will not be decided by this court unless tribal exhaustion has

occurred. The court is aware that the Bills group has appealed the jurisdictional question to various forums (#165). The Bills Group has filed a Petition for Re-Hearing on the subject of jurisdiction with the stipulated Court of Appeals. *Id.* Additionally, the court is informed that the Inter-Tribal Court of Appeals of Nevada has been re-convened and the process is "almost concluded" (#165, ex. 5). The Bills group states that they intend to file an appeal with this body (#165).

The court finds that the parties must first resolve this jurisdictional issue within the tribal court system. However, this court may review the exercise of jurisdiction, even if the underlying suit is between two tribal members, after tribal remedies have been exhausted. *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 991 (8th Cir. 1999). Thereafter, unless the federal court determines that the tribal court lacked jurisdiction, proper deference to the tribal court system precludes re-litigation of issues raised and resolved in the tribal court. *Crow Tribe of Indian v. Racicot*, 87 F.3d 1039 (9th Cir. 1996).

D. Exceptions to Tribal Exhaustion

As noted above, there are several exceptions to the rule of tribal exhaustion. In *National Farmers*, the Court stated that exhaustion would not be required where it would be "futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." 471 U.S. at 856, n. 21. It is possible that this exception may be applicable to this case.

By the Bills group's own admission, their "petition for Re-hearing before the Minnesota panel of attorneys has received absolutely no response from them" (#165). However, even if the groups re-convene the stipulated Court of Appeals, this court takes real issue with the idea that more of the Winnemucca Indian Colony's money will be spent on a jurisdictional challenge that could have been brought at the outset and that will most likely be dismissed. Additionally, the court notes that the Inter-Tribal Court of Appeals of Nevada, while on the road to being re-convened, may run into the type of roadblocks and delay commonly associated with government process.

In the event that the parties find themselves without an avenue of appeal within the time frame stated below, the court will consider arguments that the futility exception to the rule of tribal exhaustion applies. *National Farmers Union Ins. Co. v. Crow*, 471 U.S. 845 (1985). Any motions on this issue must include evidence, affidavits, and authenticated documents, in compliance with the Federal Rules of Evidence, showing the futility of pursuing the tribal court system. Upon such a motion, this court will reconsider the jurisdictional issue.

E. Stay of Proceedings

"As a Federal District Court, we have the inherent power to stay proceedings of an action, so as to control our docket, to conserve judicial resources, and to provide for just determination of cases which pend

before us." *Armstrong v. Mille Lacs County Sheriffs Dept.*, 112 F.Supp.2d 840 (D. Minn. 2000). There is no hard and fast rule on when parallel litigation should be stayed in the interests of judicial economy. *Professional Service Network, Inc. v. American Alliance Holding Co.*, 238 F.3d 897 (7th Cir. 2001). When comity among tribunals justifies giving priority to a particular suit, the other action should be stayed, rather than dismissed. *Central States, Southeast and Southwest Areas Pension Fund v. Paramount Liquor Co.*, 203 F.3d 442 (7th Cir. 2000).

Despite the fact that the court is reluctant to extend this case any longer, in the interests of tribal self-determination and self-government, the court will stay these proceedings for ninety (90) days from the date of the District Court's order in this case in an attempt to allow the Inter-Tribal Court of Appeals of Nevada and/or the stipulated Court of Appeals hear the issue of jurisdiction or the case on the merits. The court orders that a joint status report on the tribal court process be filed with this court forty-five (45) days from the date of the District Court's order in this case.

Because the court has decided to stay the proceedings until the tribal remedies can be exhausted, the Wasson group's motion for summary judgment is dismissed without prejudice as premature. *See Armstrong*, 112 F.Supp.2d at 840, n. 1. The court grants leave to re-submit this motion upon evidence of either tribal exhaustion or the valid application of one of the *National Farmers* exceptions to tribal exhaustion listed above.

IV. CONCLUSION

Based on the foregoing and for good cause appearing, the court concludes that the doctrine of tribal exhaustion applies to this case, and will stay the proceedings accordingly.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this report and recommendation within ten days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This report and recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court stay the proceedings until tribal remedies have been exhausted.

IT IS FURTHER RECOMMENDED that defendant Wasson group's motion for summary judgment (#147) be **DISMISSED WITHOUT PREJUDICE** as premature. The Wasson group is given leave to re-submit the motion for summary judgment upon

motion to the court that tribal remedies have been exhausted or that tribal exhaustion is futile.

IT IS FURTHER RECOMMENDED that the parties files a joint status report on the tribal court process within forty-five (45) days from the date of the District Court's order in this case.

DATED: February 13, 2003.

/s/ Valerie P. Cooke
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BANK OF AMERICA, N.A., a Delaware corporation, Plaintiff(s), vs. WILLIAM BILLS, *et al.*, Defendant(s).	**CV-N-00-450-HDM (VPC)** **MINUTES OF THE COURT** **August 29, 2003**

PRESENT: HONORABLE HOWARD D. MCKIBBENS, U.S. DISTRICT JUDGE

Deputy Clerk:	**Bette Stewart**	**Reporter/ Recorder:**	**None Appearing**
Counsel for Plaintiff(s):		**None Appearing**	
Counsel for Dependant(s):		**None Appearing**	

MINUTE ORDER IN CHAMBERS:

This matter is currently pending before the Inter-Tribal Court of Appeals.

Accordingly, this case is administratively closed subject to being reopened upon disposition of the matter before the Inter-Tribal Court of Appeals or application of the parties.

IT IS SO ORDERED.

LANCE S. WILSON, CLERK

By: /s/ Bette Stewart
Deputy Clerk

No. 10-1011

Supreme Court, U.S.
FILED
MAR 22 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

WINNEMUCCA COLONY COUNCIL,

Petitioner,

v.

SHARON WASSON and the
WINNEMUCCA INDIAN COLONY COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

MITCHELL C. WRIGHT, ESQ.
Nevada State Bar No. 5835
LAW OFFICES OF
MITCHELL C. WRIGHT
325 West Liberty Street
Reno, NV 89501-2011
Telephone: (775) 324-1117
Facsimile: (775) 324-1118
mitchwright@wrightlawoffices.com
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Duignan v. United States, 274 U.S. 195, 47 S.Ct. 566, 71 L.Ed. 996 (1927) 4

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 116 S.Ct. 221 (1996) 2

Kirshner v. Uniden Corp. of Am., 842 F.2d 1074 (9th Cir. 1988) 2

ARGUMENT IN REPLY

The Winnemucca Colony Council ("WCC") has petitioned this Court for a writ of certiorari to review the Order of the Ninth Circuit Court of Appeals upholding the decision of the United States District Court of Nevada granting summary judgment to Respondents, Sharon Wasson and the Winnemucca Indian Colony Council (the "Wasson Group"). The decision of a specially agreed upon appellate panel (Pet. App. 174-179) referred to in these proceedings as the Minnesota Panel Decision was held to be binding, non-appealable order[1] in full force and effect, resulting in the funds from the Bank of America account being held in interpleader being disbursed to "the council recognized by the Minnesota Panel's August 16, 2002 order" [the Wasson Group]. In so doing, the interpled funds belonging to the Winnemucca Indian Colony were given to a non-existent council[2] and inferences have been made that those individuals are

---

[1] As can be seen in the Agreement on Appellate Panel (Pet. App. 174-179), Respondents misled the District and Ninth Circuit Courts that the parties considered the Minnesota Panel binding and non-appealable. Pet. App. 5. There is no language in the Agreement that review by the specially appointed appellate panel would be binding and non-appealable. *See also* Resp. App. 8, wherein Respondents' counsel conceded that there was no exact language in the agreement that the parties would be bound.

[2] Only two (2) of the original five (5) individuals named as Council Members in that Order are still living or are members of the Tribe.

the legitimate Council Members of the Winnemucca Indian Colony.

Rather than addressing forthrightly the issues presented in the Petition, Respondents seek to disregard Appellant's History of Proceedings, strike portions of Appellant's Appendix because they are not part of the record, and disregard issues not presented or pressed upon when under review.

The History of Proceedings provided by Appellant was set forth to provide this Court with an overview of facts from the onset of the disputes between the tribal factions to give a better understanding of the case and issues involved. The facts are supported by Petitioner's Appendix. To strike portions of the History as suggested by Respondents will result in leaving out important procedural facts, facts that are relevant to these proceedings.

Respondents seek to strike certain portions of Appellant's Appendix because they were not included in the excerpts of record to the Ninth Circuit. In support of this, Respondent cites *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 454, 116 S.Ct. 221, 2232 (1996). The authority cited was found in *fn. 3* of Justice Scalia's dissenting opinion and the case involved issues pertaining to excessive jury awards. Respondent additionally cites *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1078 (9th Cir. 1988), wherein portions of excerpts were stricken because they were submitted in violation of that Court's rules. Respondent does not provide any authority to support

the proposition that portions of an appendix not part of the record below submitted with a Petition for Writ of Certiorari to the United States Supreme Court must be stricken.

Because of the significance of this case, Petitioner deemed it extremely important to provide this Court with pertinent information to provide a better understanding of what is involved. Petitioner's Appendix 8-24 was provided to support Petitioner's contention that the Ninth Circuit Court's decision was of importance to the Interior Board of Indian Appeals and the Bureau of Indian Affairs, as well as other entities, in addition to showing the BIA's refusal to recognize either faction as the legitimate government of Winnemucca Indian Colony. Petitioner's Appendix 185-188 was submitted to support Petitioner's contention that the ruling would be interpreted as identifying Respondents as the legitimate Tribal Council.

Petitioner's Appendix 47-71 consist of rulings by the Inter-Tribal Court of Nevada, the underlying case related to Respondents' Motion for Preliminary Injunction, USDC Case No. CV-N-04-0573. Respondents' Appendix 1-38 pertains to that case and is part of the record. Petitioner's Appendix 99-158 is the decision of Judge Steven Haberfeld and is referred to in Resp. App. 39-64. Petitioner's Appendix 159-171 is the Restraining Order issued by Tribal Court Judge Kyle Swanson at the onset of the controversies, and Pet. App. 174-179 is the Agreement on Appellate Panel, critical evidence supporting Petitioner's assertion that it did not enter into a binding and non-appealable agreement to submit the appeal to the

Minnesota Panel. These documents support the History of Proceedings provided by Petitioner and support contentions made by Petitioner in the Petition.

There is no question that a complete record was not provided to the Ninth Circuit during the appellate proceedings by either Petitioner's prior counsel or Respondents' counsel. Indeed, only several pages of the Minnesota Panel decision was provided to the Ninth Circuit. Petitioner's Appendix includes the Minnesota Panel decision in its entirety. Pet. App. 72-98.

Respondents further contend that issues not presented or pressed upon when under review should be disregarded. This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed. *Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927) (citations omitted). This case is unique and any questions that may be considered not pressed or passed upon in the lower court are within the ambit of review under this exception.

Respondents go into great detail berating and blaming Petitioner for the years of prolonged litigation. As set forth in Petitioner's History of Proceedings, it was Acting Chairman William Bills (the "Bills Group" that evolved into WCC) who initiated action in the Tribal Court against the other members of the Winnemucca Colony Council in an effort to prevent the misuse and embezzlement of tribal funds. Pet.

App. 159-171. After the Restraining Order was issued by Tribal Court Judge Swanson, Respondents terminated the Tribal Court Judge. This action, as well as other disputes including issues pertaining to the fair and proper enrollment of tribal members, resulted in the split of factions and the commencement of actions by both groups. *See, e.g.*, Pet. App. 99-158, 174-179, 72-98, 61-71, 47-60; 8-24; Resp. App. 39-64, 1-38. Furthermore, after Magistrate Judge Valerie Cooke stayed the instant proceedings in an Order dated February 13, 2003 (Resp. Brf. 10, 63), Petitioner's motion for rehearing was brought before ITCAN (Pet. App. 61-71, 47-60). While the ITCAN panel of judges were well on the way to addressing enrollment issues which would have subsequently led to a valid election of a council by these members, Respondents brought suit for injunctive relief against ITCAN (Resp. Brf. 1-38), disrupting the proceedings.

Respondents are hypocritical in issuing all blame to Petitioner for the longevity of the proceedings and stating that Petitioner has failed to live up to the agreements that it entered into to resolve this matter (Resp. Brf. 7). The conduct of Respondents' counsel and Petitioner's prior counsel has been previously addressed. "The way in which this case had advanced procedurally has created disorder and confusion. The court finds that the facts regarding how the attorneys in this case have conducted themselves are disturbing." Resp. App. 43. *Citing* U.S. Magistrate Judge Valerie P. Cooke.

Respondents purport that the "[e]xhaustion of Tribal remedies and extending comity to a Tribal Court decision were the only two issues brought before the United States District Court." Resp. Brf. 14. This is not a true statement of the issue presented. The sole issue in this case is which parties are entitled to the Bank of America funds. Resp. App. 54. The determination of who has access to the money is dependent upon a resolution of which group constitutes the legal WIC tribal counsel. *Id.* In upholding the District Court's granting of summary judgment and extending comity to the Minnesota Panel's decision based on the misleading assertion by Respondents that the agreement was final and binding (*see fn. 1 supra*), the Ninth Circuit inferred that Respondents constitute the legitimate Tribal Counsel for the Winnemucca Indian Colony.

This case presents novel issues which are of great importance to Tribal Governments throughout the United States. This Court's decision will help refine the continuing trust relationship and responsibilities to all recognized tribal governments.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

MITCHELL C. WRIGHT, ESQ.
Nevada State Bar No. 5835
LAW OFFICES OF
MITCHELL C. WRIGHT
325 West Liberty Street
Reno, NV 89501-2011
Telephone: (775) 324-1117
Facsimile: (775) 324-1118
mitchwright@wrightlawoffices.com
Counsel for Petitioner